90-720

No. 90-

Supreme Court, U.S.
FILED
NOV 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALFREDO DEVARGAS,

Petitioner,

—v.—

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Steven R. Shapiro
(*Counsel of Record*)
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Richard Rosenstock
369 Montezuma, Suite 102
Santa Fe, New Mexico 87504
(505) 988-5324

Steven G. Farber
409 Hillside Avenue
Santa Fe, New Mexico 87504
(505) 988-9725

David Rudovsky
Kairys & Rudovsky
924 Cherry Street
Philadelphia, Pennsylvania 19107
(215) 925-4400

Philip B. Davis
American Civil Liberties Union of New Mexico
814 Marquette, N.W.
Albuquerque, New Mexico 87102
(505) 242-1904

QUESTION PRESENTED

Whether the court below erred in concluding, contrary to two other circuits, that the Civil Rights Restoration Act of 1987 does not apply to cases that were pending at the time of its enactment?

LIST OF PARTIES

In addition to the parties appearing in the caption, the following defendants participated in the proceedings below: Los Alamos National Laboratory; Gary Granere; Regents of University of California; the United States Department of Energy; Donald Paul Hodel; John S. Herrington; John Doe; and Richard Roe.

With the exception of Mr. Granere, the claims against these defendants were dismissed for reasons outside the scope of the petition. Any claims against Mr. Granere that might be within the scope of the petition are no longer being pursued. *See* n.12, *infra*.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

A. Factual Background 4

B. Proceedings Below 6

REASONS FOR GRANTING THE WRIT 11

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH CONTRARY HOLDINGS BY THE SECOND AND ELEVENTH CIRCUITS 11

II. THE DECISION BELOW IS INCONSISTENT WITH CONGRESSIONAL INTENT ON A CIVIL RIGHTS ISSUE OF NATIONAL SIGNIFICANCE 14

III. THE DECISION BELOW REFLECTS CONFUSION IN THE LOWER COURTS REGARDING THE MEANING OF RETROACTIVITY AND THE APPROPRIATE STANDARDS TO APPLY 16

CONCLUSION 19

Page

APPENDIX 1a

Memorandum Opinion and Judgment of the District Court, April 9, 1986 ..... 1a

Memorandum Opinion and Judgment of the District Court, December 14, 1988 ..... 29a

Order of the District Court Denying Motion to Alter or Amend Judgment, February 8, 1989 ..... 42a

Opinion of the Court of Appeals, August 9, 1990 ..... 44a

TABLE OF AUTHORITIES

Page

Cases

Alpo v. Ralston Purina Co.,
No. 89-7181 (D.C.Cir. Sept. 7, 1990)
(LEXIS, Genfed library, CtApp file) 18

Ayers v. Allain,
893 F.2d 732 (5th Cir.),
vacated and rev'd on other grounds,
No. 88-4103 (5th Cir. Sept. 28, 1990)(*en banc*)
(LEXIS, Genfed library, CtApp file) 10, 12

Bonner v. Arizona Dep't of Corrections,
714 F.Supp. 420 (D.Ariz. 1989) 13

Bowen v. Georgetown University Hospital,
488 U.S. 204, 109 S.Ct. 468 (1988) 10, 16, 17, 18

Bradley v. Richmond School Board,
416 U.S. 696 (1974) 10, 16, 17, 18

Consolidated Rail Corp. v. Darrone,
465 U.S. 624 (1984) 7, 8, 11

Dep't of Transportation v.
Paralyzed Veterans of America,
477 U.S. 597 (1986) 9

Grove City College v. Bell,
465 U.S. 555 (1984) 7, 8, 11, 14, 15

Gruber v. Price Waterhouse,
911 F.2d 960 (3d Cir. 1990) 18

Kaiser Aluminum & Chem. Co. v. Bonjorno,
___ U.S. ___, 110 S.Ct. 1570 (1990) 16, 18

Leake v. Long Island Jewish Medical Center,
695 F.Supp. 1414 (E.D.N.Y. 1988),
aff'd, 869 F.2d 130 (2d Cir. 1989) 9, 11, 12, 13

Page

Lussier v. Dugger,
904 F.2d 661 (11th Cir. 1990) 9, 11, 13

McKnight v. General Motors Corp.,
908 F.2d 104 (7th Cir. 1990) 18

Sargisson v. United States,
No. 90-5034 (Fed.Cir. Aug. 31, 1990)
(LEXIS, Genfed library, CtApp file) 18

Thorpe v. Durham Housing Authority,
393 U.S. 268 (1969) 17

Wright v. Director,
Federal Emergency Management Agency,
No. 89-4033 (11th Cir. Oct. 11, 1990)
(LEXIS, Genfed library, CtApp file) 18

Statutes and Regulations

10 C.F.R. §1046 ..... 5, 6

28 U.S.C. §1254(1) 2

42 U.S.C. §2000d-7 7

Civil Rights Restoration Act of 1987,
Pub.L.No. 100-259,
102 Stat. 28 (1988) ..... *passim*

Department of Energy,
Interim Management Directive No. 6102 ..... 5, 6, 7

Rehabilitation Act of 1973, *as amended*
§503, 29 U.S.C. §793 ..... 1, 6
§504, 29 U.S.C. §794 ..... *passim*

Page

Legislative History

134 Cong. Rec. H583
(daily ed. Mar. 2, 1988) 15

134 Cong. Rec. S2735
(daily ed. Mar. 22, 1988) 15

S.Rep. No. 64, 100th Cong., 2d Sess. 2,
reprinted in 1988 U.S Code
Cong. & Admin. News 3 15

No. 90-

IN THE
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ALFREDO DeVARGAS,

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MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Alfredo DeVargas respectfully requests that a writ of *certiorari* issue to review the judgment entered in this case by the United States Court of Appeals for the Tenth Circuit on August 9, 1990.

OPINIONS BELOW

Petitioner initiated this action in 1983 alleging that he was denied employment solely because of his handicap in violation of the Constitution and §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

The district court's opinion granting summary judgment for respondents on petitioner's §504 claim, *inter alia*, was entered on April 9, 1986. It is reprinted in the Appendix at 1a-28a.

The district court's opinion dismissing petitioner's second amended complaint in its entirety was entered on December 14, 1988. It is reprinted in the Appendix at 29a-41a.

The district court's order denying petitioner's motion to alter or amend the judgment was entered on February 8, 1989. It is reprinted in the Appendix at 42a-43a.

The opinion of the Court of Appeals for the Tenth Circuit holding that the Civil Rights Restoration Act of 1987 does not apply to petitioner's §504 claim, although it was enacted during the pendency of this litigation, was entered on August 9, 1990. It is reported at 911 F.2d 1377, and is reprinted in the Appendix at 44a-75a.

An earlier opinion of the Court of Appeals finding that the private defendants were entitled to a qualified immunity defense on petitioner's constitutional claims was entered on April 7, 1988 and is reported at 844 F.2d 714 (10th Cir. 1988). That opinion, issued on the basis of an interlocutory appeal, reversed a district court opinion entered on October 21, 1986, which held that only the public defendants were entitled to immunity on petitioner's constitutional claims. These decisions have not been reprinted in the Appendix because the issues they address are beyond the scope of this petition.

JURISDICTION

The opinion of the Court of Appeals was entered on August 9, 1990. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §794, as amended by the Civil Rights Restoration Act, provides in pertinent part:

(a) No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service . . . .

(b) For the purposes of this section, the term "program or activity" means all of the operations of --

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole

proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance . . . .

STATEMENT OF THE CASE

A. Factual Background

Petitioner Alfredo DeVargas is a former policeman who is blind in one eye as a result of a childhood accident. Despite this disability, he majored in law enforcement in junior college, was certified as a law enforcement officer at the New Mexico Law Enforcement Academy, completed National Safety Council Defensive Driving courses, and was employed as a police officer in New Mexico for approximately seven years. His ability to perform the duties of a law enforcement officer in these various settings, including the handling of firearms, is undisputed in the record.

In 1981, petitioner applied for a job as a security inspector at the Los Alamos National Laboratory ("LANL"). LANL is a nuclear weapons and energy research facility operated by the Regents of the University of California pursuant to a contract with the United

States Department of Energy ("DOE"). In turn, the Regents chose to subcontract with Mason & Hanger-Silas Mason Co. ("Mason & Hanger"), a private corporation, to provide security personnel.

Notwithstanding petitioner's past record as a law enforcement officer, Mason & Hanger refused to process his 1981 application for security inspector solely because he was blind in one eye.[1] Two years later petitioner reapplied, and was again rejected for the same reason. The company claimed that these rejections were required by a then-applicable DOE regulation, Interim Management Directive No. 6102 ("IMD No. 6102"), which listed blindness in one eye as a medically disqualifying condition for security inspectors. However, IMD No. 6102 also contained a waiver provision allowing a designated physician to determine upon examination that an individual with an ordinarily disqualifying condition was, nevertheless, medically qualified to perform the duties of a security inspector.[2] For purposes of summary judgment, respondents did not dispute petitioner's assertion that he is an otherwise qualified handicapped individual. Yet, neither in 1981 nor in 1983 was petitioner given any opportunity to seek a waiver or to demonstrate that he was otherwise qualified to perform the job responsibilities of a security inspector.[3]

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[1] Under the Department of Energy regulations then applicable to the physical protection of classified matter and information at DOE facilities, security inspectors were defined as uniformed individuals who carry firearms and are charged with protecting government property, including special nuclear materials. Interim Management Directive No. 6102, App.IV, §A(6)(b)(8).

[2] In addition, the regulations provided that medically disqualifying conditions "shall be made by a designated physician." *Id.* at §(A)(3)(e). Petitioner was never seen by a physician before his applications were rejected.

[3] In November 1984, IMD No. 6102 was superceded by new regula-
(continued...)

After his second application was rejected, petitioner filed suit in federal court requesting declarative and injunctive relief as well as money damages. In his complaint he charged that the refusal to process his applications violated §504 of the Rehabilitation Act, 29 U.S.C. §794,[4] as well as his constitutional rights under the Fifth and Fourteenth Amendments.[5] Petitioner further alleged that DOE promulgated IMD No. 6102 in violation of §504 and the Fifth Amendment. The complaint named as defendants: Mason & Hanger and two of its employees; LANL; the Regents of the University of California ("Regents" or "University") and three University employees ("individual LANL defendants"); as well as DOE, the Secretary of Energy and the Acting Area Manager for DOE's LANL office.

B. Proceedings Below

In April 1986, the district court dismissed all of petitioner's claims against the Regents and LANL based on

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[3] (...continued)
tions, which are codified at 10 C.F.R. §1046. Like IMD No. 6102, the new regulations list one-eyed individuals as medically disqualified for security inspector duties. 10 C.F.R. §1046, Subpart B, App. A., §E.2.h. They also contain a waiver provision similar to that in IMD No. 6102.

[4] Section 504 prohibits discrimination against an otherwise qualified handicapped individual in any program or activity receiving federal financial assistance. Petitioner subsequently asserted in a second amended complaint that defendants had also violated §503 of the Rehabilitation Act, 29 U.S.C. §793, which requires that all government contracts in excess of $2,500 for the procurement of personal property and nonpersonal services contain a provision requiring affirmative steps to employ and advance qualified handicapped individuals.

[5] Petitioner, a Hispanic, originally alleged discrimination on the basis of national origin as well as handicap. That issue was resolved against petitioner, 36a -37a, and is not a part of this appeal.

their Eleventh Amendment immunity. 14a-16a.[6] The court also dismissed petitioner's damage claims against DOE and the DOE defendants who had been sued in their official capacities on grounds of sovereign immunity. 16a-17a.[7] Petitioner's facial challenge to the constitutionality of IMD No. 6102 was rejected. And, most importantly for purposes of this petition, the district court granted defendants' motion for summary judgment on petitioner's statutory claim under §504 of the Rehabilitation Act. 2a-8a.

The district court's ruling on the §504 claim rested squarely on this Court's decision in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984), which had limited §504's prohibition against discrimination to those specific programs receiving federal funds. 2a.[8] In particular, the district court found that Mason & Hanger's provision of a security force for LANL was not a program or activity receiving federal financial assistance and therefore, in the district court's view, not governed by the provisions of §504. 3a-8a.[9]

Six months later, the district court ruled that the remaining DOE and LANL defendants were entitled to qualified immunity on any damage claim arising from their alleged violation of petitioner's constitutional rights.

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[6] Congress subsequently abrogated any Eleventh Amendment defenses to a §504 claim that is based on conduct occurring after October 21, 1986. *See* 42 U.S.C. §2000d-7.

[7] The trial court granted the Secretary of Energy's motion to dismiss for insufficiency of service. 24a.

[8] The decision in *Consolidated Rail* was issued the same day as *Grove City College v. Bell*, 465 U.S. 555 (1984), and rested on the same reasoning.

[9] There is no dispute that other programs and activities of the University of California, both at its LANL operation and on its California campuses, receive federal financial assistance.

At the same time, the district court rejected the qualified immunity claim of the Mason & Hanger defendants, both corporate and individual, on the ground that private corporations could not raise a qualified immunity defense.

The Mason & Hanger defendants sought review of that ruling in an interlocutory appeal. While their appeal was pending, Congress enacted the Civil Rights Restoration Act of 1987.[10] Its purpose, as set forth in the preamble, was to "restore the prior consistent and longstanding executive branch interpretation and broad, institution-wide application of [Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964] as previously administered [before the decisions in *Grove City College v. Bell*, 465 U.S. 555 (1984) and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984)]." Restoration Act, Pub. L.No. 100-259, 102 Stat. 28 (1988) at §2. In furtherance of that goal, the Act provides that prohibitions against discrimination by federally funded programs or activities must be applied on an institution-wide basis rather than a program-specific basis.

Shortly thereafter, the Tenth Circuit reversed the district court and held that the Mason & Hanger defendants were entitled to the same qualified immunity as the public defendants on petitioner's constitutional claims. The Tenth Circuit did not address the impact of the Restoration Act in this interlocutory ruling because petitioner's §504 claim was not before it at the time.

On remand, the district court rejected all of petitioner's remaining claims and, in December 1988, dismissed his complaint in its entirety without any mention of the

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[10] Although known as the Civil Rights Restoration Act of 1987, the Act was actually enacted over a presidential veto on March 22, 1988.

newly enacted Restoration Act. 29a-41a. Petitioner then appealed to the Tenth Circuit arguing, *inter alia*, that the district court had erred in rejecting his Rehabilitation Act claim.

The Court of Appeals affirmed the dismissal of petitioner's §504 claim on two grounds.[11] First, it held that Mason & Hanger did not receive federal financial assistance and thus was not subject to the antidiscrimination provisions of §504. 48a-50a. Second, it concluded that the Restoration Act was not meant to apply to cases pending at the time of its enactment and, accordingly, that petitioner could not pursue a §504 claim against the LANL defendants although the University of California clearly receives federal financial assistance, both at LANL and its California campuses. 51a-72a.[12]

The Tenth Circuit acknowledged that its ruling on the Restoration Act was squarely in conflict with contrary holdings by both the Second and Fifth Circuits.[13]

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[11] As the Tenth Circuit noted, respondents did not assert a qualified immunity defense to petitioner's §504 claim. 48a, n.4.

[12] Because of the Tenth Circuit's approach to this case, it never considered whether the Mason & Hanger defendants would be covered by §504 if the Restoration Act were deemed to apply to pending litigation. In petitioner's view, that issue can and should be explored by the district court in the first instance if the case is remanded for further proceedings. For present purposes, it is sufficient to note that Mason & Hanger, as a subcontractor, is in a very different position than the commercial airlines that this Court characterized as mere "beneficiaries" of federal funding in *Dep't of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), and that the recipients of federal financial assistance cannot avoid their statutory obligations under §504 merely by hiring a subcontractor. By contrast, petitioner is no longer pursuing a §504 claim against defendant Granere, despite some confusion in the record. 72a.

[13] The Tenth Circuit was apparently unaware that its ruling on the Restoration Act also conflicted with the Eleventh Circuit's decision in *Lussier v. Dugger*, 904 F.2d 661 (11th Cir. 1990).

See Leake v. Long Island Jewish Medical Center, 869 F.2d 130 (2d Cir. 1989); *Ayers v. Allain*, 893 F.2d 732 (5th Cir.), *vacated and rev'd on other grounds*, No. 88-4103 (5th Cir. Sept. 28, 1990)(LEXIS, Genfed library, CtApp file)(*en banc*).[14] It also recognized that this conflict extended to its reasoning as well as its result.

Thus, contrary to every other circuit that has addressed the issue, the Tenth Circuit determined that the legislative history of the Restoration Act was not dispositive on the retroactivity question. 54a-62a. It therefore analyzed the question by reference to what it regarded as generally applicable retroactivity principles. Based on its review of the governing law, the Tenth Circuit concluded that this Court has developed two divergent lines of authority. It viewed one line, represented by *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), as holding that a court must apply the law in effect at the time it renders its decision, even in the absence of a clear congressional directive, unless to do so would cause manifest injustice. It viewed the other line, represented by *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468 (1988), as standing for the principle that statutes are to be construed prospectively unless Congress has clearly indicated its intent that they be applied retroactively.

Believing *Bowen* and *Bradley* to be irreconcilable, the Tenth Circuit "chose" to disregard *Bradley* and apply *Bowen*. 66a. Under *Bowen*, the Tenth Circuit then ruled that the Restoration Act does not apply on appeal to petitioner's §504 claim. Petitioner now seeks *certiorari* to review that pivotal ruling in his case.[15]

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[14] The *en banc* opinion in *Ayers* was issued after the Tenth Circuit's decision in this case and does not address the Restoration Act.

[15] The Tenth Circuit also rejected other claims by petitioner that are not before the Court on this petition for *certiorari*.

REASONS FOR GRANTING THE WRIT

Congress adopted the Civil Rights Restoration Act of 1987 to correct what it perceived to be this Court's erroneous intepretation of congressional intent in *Grove City College v. Bell*, 465 U.S. 555.[16] The question presented by this case is whether the benefits of that clarification should be denied to litigants whose cases were pending at the time of the Act's enactment.

Petitioner respectfully submits that this issue warrants plenary review for three independent reasons. First, the Tenth Circuit's refusal to apply the Act's remedial provisions to pending litigation is directly contrary to the holding of two other circuits. Second, the decision below effectively frustrates congressional intent on a civil rights issue of national significance. Third, the decision below reflects confusion in the lower courts regarding the scope and consistency of this Court's retroactivity decisions.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH CONTRARY HOLDINGS BY THE SECOND AND ELEVENTH CIRCUITS

This case presents a classic conflict among the circuits. In granting summary judgment for defendants in this case, the Tenth Circuit concluded that the Civil Rights Restoration Act of 1987 should not apply to litigation pending at the time of its enactment. Two other circuits have reached precisely the opposite conclusion. *See Leake v. Long Island Jewish Medical Center*, 869 F.2d 130 (2d Cir. 1989)(*per curiam*); *Lussier v. Dugger*, 904

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[16] The holding of *Grove City* was extended to §504 in the companion case of *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624. *See* n.8, *supra*.

F.2d 661 (11th Cir. 1990).[17] Neither the reasoning nor result of those cases can be reconciled with the decision below.

The plaintiff in *Leake* was a hospital worker with only one arm who alleged that he was fired because of his handicap in violation of §504. Like the complaint in this case, the complaint in *Leake* was filed prior to passage of the Restoration Act. But, unlike the Tenth Circuit, the *Leake* court was persuaded by the language and legislative history of the Act that it should be applied to pending litigation.[18] In support of that conclusion, the *Leake* court cited several statements by the Act's sponsors. *See* Point II, *infra*. It also stressed that the title and purpose of the Act plainly imply retroactivity, even if Congress did not state so explicitly.[19]

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[17] *See also Ayers v. Allain*, 893 F.2d 732 (5th Cir.), *vacated and rev'd on other grounds*, No. 88-4103 (5th Cir. Sept. 28, 1990)(LEXIS, Genfed library, CtApp file)(*en banc*).

[18] This discussion of *Leake* primarily refers to the reasoning of the district court, 695 F.Supp. 1414 (E.D.N.Y. 1988), which was unanimously adopted by the Second Circuit.

[19] The panel decision in *Ayers* applied a similar analysis and reached a similar conclusion. Although its opinion was subsequently vacated on other grounds, *see* n.14, *supra*, its reasoning is instructive and was discussed at length by the Tenth Circuit. 59a-62a. As the *Ayers* panel explained:

> Retroactive application of a statute is appropriate when Congress enacts the statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture. This rule flows from two of the Supreme Court's canons of statutory construction. First, subsequent legislation declaring the intent of an earlier statute is entitled to great weight . . . Second, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.

893 F.2d at 755 (footnotes omitted).

In *Lussier*, the Eleventh Circuit joined the Second Circuit in holding that the Restoration Act was meant to apply to pending litigation. The plaintiff was a dentist in the Florida state prisons who contested the fact that he was not rehired, in violation of §504, after recovering from hepatitis. As in *Leake*, the case was pending in the district court when the Restoration Act was enacted.

Focusing on the issue of congressional intent, the Eleventh Circuit agreed with the analysis adopted by the Second Circuit:

> In this instance the history of the 1988 legislation reveals no hint that Congress intended the amendment to apply prospectively only. Indeed, the language of the amendment, which makes repeated assertions that the statute will "restore" and "clarify" Congress' original intent to apply the antidiscrimination laws broadly, is strongly consistent with retroactive application. Finally, and of the utmost importance, the statute's sponsors stated in debate that the bill should apply retroactively.

904 F.2d at 666 (footnote omitted).[20]

The Tenth Circuit adopted a totally different approach. It found no evidence of congressional intent on the issue of retroactivity, resorted to a presumption that other courts found inapplicable, and reached a conclusion directly at odds with the Second and Eleventh Circuits. Only this Court can now resolve that conflict.

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[20] In addition to the circuit court decisions mentioned above, at least one district court has also held that the Restoration Act applies to litigation pending at the time of its enactment. *See Bonner v. Arizona Dep't of Corrections*, 714 F.Supp. 420, 422-23 (D.Ariz. 1989).

II. THE DECISION BELOW IS INCONSISTENT WITH CONGRESSIONAL INTENT ON A CIVIL RIGHTS ISSUE OF NATIONAL SIGNIFICANCE

The Tenth Circuit's interpretation of the Restoration Act is not only inconsistent with the view of two other circuits, it is also inconsistent with the Act's essential purpose, which was to "restore" the law to what it had been prior to this Court's decision in *Grove City*. In the Tenth Circuit's view, that purpose is served if the Act's remedial provisions are only applied to claims arising after the Act's passage. Congress, however, had a broader purpose in mind.

That broader purpose is reflected in the language of the statute itself, the committee report that accompanied it, and the remarks of key legislators who supported it. Relying on these traditional indicia of legislative intent, two circuits have held that the Restoration Act was meant to apply to pending litigation. *See* Point I, *supra*. The Tenth Circuit, by contrast, refused to rely on the traditional tools of statutory construction. Instead, it apparently concluded that Congress' failure to include a retroactivity provision in the Act necessarily means that Congress had no position on the retroactivity issue. This Court's decisions do not support that conclusion. *See* Point III, *infra*. Nor does a fair reading of the legislative record.

To the contrary, it seems perfectly clear that Congress did not include an express retroactivity provision in the Act because Congress did not believe it was creating new rights. As explained in the Act's preamble: "[L]egislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of the [civil rights] laws as previously administered." Once this purpose was accomplished, Congress quite evidently felt that the law would return to what it had been prior to *Grove City* and the issue of retroactivity would never arise in the classic

sense.[21]

This view was expressed repeatedly throughout the legislative debates. For example, Senator Packwood responded to critics of the bill by commenting that: "[A]ll we have done is change the law back to what we thought it was. We have not expanded it beyond what we thought it was." 134 Cong. Rec. S2735 (daily ed. Mar. 22, 1988). Senator Stafford, one of §504's original sponsors, noted that an "institution-wide definition [was] originally intended by legislators." *Id.* at 2739. The Senate Report recommending passage of the Act described the impact of *Grove City* on civil rights claims and then observed that some of the cases affected by *Grove City* "were in the formal enforcement stage [and thus] still in jeopardy." S.Rep. No. 64, 100th Cong., 2d Sess. 2, *reprinted in* 1988 U.S Code Cong. & Admin. News 3, 13. Finally, Congressman Edwards, who served as floor sponsor of the bill during the debate to override President Reagan's veto, clearly and unequivocally stated that, "this bill applies to all pending cases . . . ." 134 Cong. Rec. H583 (daily ed. Mar. 2, 1988).

Review by this Court is essential because the error committed by the Tenth Circuit goes to the heart of one of this nation's basic civil rights statutes. If left unaddressed, it will produce the anomalous result of condoning discrimination that Congress has twice condemned. In effect, petitioner and those like him will be forced to bear the burden of what has turned out to be this Court's erroneous interpretation of congressional intent in *Grove City*. That allocation of costs is both unnecessary and unjust in a civil rights context.

Congress adopted the Restoration Act to "reaffirm" its commitment to a broad construction of the civil rights laws that had been narrowly construed by the *Grove City*

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[21] *See* n.22, *infra*.

decision. S.Rep. No. 64, *supra*, at 2. It should not be frustrated in achieving that goal for a second time.

III. THE DECISION BELOW REFLECTS CONFUSION IN THE LOWER COURTS REGARDING THE MEANING OF RETROACTIVITY AND THE APPROPRIATE STANDARDS TO APPLY

The court below, "upon determining that the language and legislative history of the Restoration Act [did] not evidence a clear congressional intent for or against its retroactive application, [turned] to Supreme Court precedent for guidance." 62a. Based on that review, the Tenth Circuit concluded that this Court has set forth conflicting presumptions on the issue of retroactivity.[22] Specifically, the Tenth Circuit read *Bradley v. Richmond School Board*, 416 U.S. 696, as announcing a presumption in favor or retroactivity. At the same time, it read *Bowen v. Georgetown University Hospital*, 488 U.S. 204, as announcing a presumption against retroactivity. If that quandary is real, it needs to be resolved. If the quandary is false, as petitioner believes, the relevant principles obviously need to be clarified.

Bradley involved a class action brought to desegregate the Richmond, Virginia school system. The specific

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[22] Part of the confusion lies in the ambiguous use of the term "retroactivity." In fact, there are two quite different contexts in which the term is frequently employed: (1) "true retroactivity," in which a regulation or statute is applied collaterally to a final judgment, *e.g.*, *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (rejecting such application); and (2) application of a newly enacted statute to pending litigation, *e.g.*, *Bradley v. Richmond School Board*, 416 U.S. 696 (endorsing such application). *See also Kaiser Aluminum & Chem. Co. v. Bonjorno*, ___ U.S. ___, ___, 110 S.Ct. 1570, 1591 (1990)(White, J., dissenting)(true retroactivity refers to "the application of a change in law to overturn a judicial adjudication of rights that has already become final").

issue facing the Court was whether an attorney's fee statute that became effective during the pendency of the appeal was to be applied by the appellate court. Relying on *Thorpe v. Durham Housing Authority*, 393 U.S. 268 (1969), this Court held that "a court is to apply a law in effect at the time it renders its decision," unless doing so would result in manifest injustice, *Bradley*, 416 U.S. at 716-17, or unless there is "statutory direction or legislative history to the contrary." *Id.* at 711. *Bradley* and *Thorpe* expressly reject "the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Id.* at 715 (footnote omitted).

In *Bowen*, the Court was confronted with the question of whether the Secretary of Health and Human Services had the authority to promulgate a retroactive Medicare cost-limit rule that would have required seven hospitals to refund $2 million that they had received under the old reimbursement rule. The new regulation was in fact a reissuance of a rule previously struck down as a result of litigation brought by the hospitals because its promulgation had violated the Administrative Procedure Act notice and comment requirements. Rather than appeal, the Secretary had chosen to begin anew, had complied with APA requirements and then reissued a rule with explicitly retroactive effect.[23]

The *Bowen* Court found that the Secretary did not have authority under either general administrative law or under the specific enabling legislation to issue retroactive cost-limit rules. In so ruling, the Court stated that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language

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[23] Thus, unlike *Bradley*, *Thorpe*, and this case, *Bowen* did not involve the application of a law or regulation to pending litigation. *See* n.22, *supra*.

requires this result." *Bowen*, 109 S.Ct. at 471.

The "apparent tension" between *Bradley* and *Bowen* has been the subject of recent comment by this Court. *See Kaiser Aluminum & Chem. Co. v. Bonjorno*, 110 S.Ct. at 1577. It has also caused confusion in the lower courts.[24] Justice Scalia's concurring opinion in *Kaiser* referred to the "irreconcilable conflict" between *Bradley* and *Bowen*. 110 S.Ct. at 1579. Justice White's dissent in *Kaiser*, joined by three other justices, characterized the "tension [as] more apparent than real." *Id.* at 1591. The *Kaiser* majority, adopting a middle road, noted the confusion but left it unresolved "because under either view, where the congressional intent is clear, it governs." *Id.* at 1577.

Petitioner shares Justice White's view that the "tension" between *Bradley* and *Bowen* can in fact be resolved and that the resolution most often lies, as the *Kaiser* majority found, in a fair and diligent search for legislative intent. Petitioner also believes that the legislative intent in this instance is clear and was wrongly ignored by the Tenth Circuit. *See* Point II, *supra*. It is nonetheless plain that the lower courts need further guidance in this area and, indeed, are actively seeking it. This case provides an appropriate vehicle for that instruction.

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[24] *See, e.g., Wright v. Director, Federal Emergency Management Agency*, No. 89-4033 (11th Cir. Oct. 11, 1990)(LEXIS, Genfed library, CtApp file); *Alpo v. Ralston Purina Co.*, No. 89-7181, 7264 (D.C.Cir. Sept. 7, 1990)(LEXIS, Genfed library, CtApp file); *Sargisson v. United States*, No. 90-5034 (Fed.Cir. Aug. 31, 1990)(LEXIS, Genfed library, CtApp file); *Gruber v. Price Waterhouse*, 911 F.2d 960 (3d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990).

CONCLUSION

For the reasons stated above, the petition for *certiorari* should be granted.

Respectfully submitted,

Steven R. Shapiro
(*Counsel of Record*)
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Richard Rosenstock
369 Montezuma, Suite 102
Santa Fe, New Mexico 87504
(505) 988-5324

Steven G. Farber
409 Hillside Avenue
Santa Fe, New Mexico 87504
(505) 988-9725

David Rudovsky
Kairys & Rudovsky
924 Cherry Street
Philadelphia, Pennsylvania 19107
(215) 925-4400

Philip B. Davis
American Civil Liberties Union
of New Mexico
814 Marquette, N.W.
Albuquerque, New Mexico 87102
(505) 242-1904

Dated: November 2, 1990

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CV No. 83-1674 HB

MASON & HANGER-SILAS MASON CO., INC., T. R. HOOK, individually and in his official capacity; DON HARDWICK, individually and in his official capacity; THE UNITED STATES DEPARTMENT OF ENERGY, DONALD PAUL HODEL, individually and in his official capacity; GARY GRANERE, individually and in his official capacity; JOHN DOES ONE AND TWO, individually and in their official capacity; LOS ALAMOS NATIONAL LABORATORY; REGENTS OF THE UNIVERSITY OF CALIFORNIA; DONALD KERR, in his individual capacity; ED C. WALTERSCHEID, in his official capacity; and RICHARD ROES ONE AND TWO, in their official capacity,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on a number of pre-trial motions filed by the plaintiff and the defendants. The Court has considered the motions, the memoranda and exhibits filed by the parties in conjunction therewith, the entire record, and consulted the applicable authorities.

This is a civil rights action arising out of the alleged refusal of defendants Mason & Hanger-Silas Mason Co., Inc., and its employees, T. R. Hook and Don Hardwick ("the Mason & Hanger defendants"), to consider plaintiff's application for a position as a security inspector at the Los Alamos National Laboratory ("LANL") facilities in Los Alamos, New Mexico. Mason & Hanger employs individuals as security inspectors at LANL pursuant to a subcontract with LANL. LANL, in turn, is organized pursuant to a contract between the United States Department of Energy ("DOE") and The Regents of the University of California, and is engaged in weapons and atomic energy research.

Plaintiff has only one eye. He applied for employment at Mason & Hanger in November, 1981, and again in 1983. Plaintiff alleges that the defendants' refusal to consider his application for employment constituted a violation of Section 504 of the Rehabilitation act [sic] of 1973, 29 U.S.C. § 794 (1982 ed.), and unlawfully discriminated against him because of his Mexican-American or Spanish-American ancestry, handicap, and/or exercise of his First Amendment right of free association, in violation of 42 U.S.C. § 1983 (1976). Plaintiff further alleges that the above actions by the defendants also violated plaintiff's rights guaranteed under the First and Fifth Amendments. Finally, plaintiff alleges that DOE regulation, Interim Management Directive No. 6102, is unconstitutional and violates Section 504 of the Rehabilitation act [sic] of 1973 and the Fifth Amendment.

I. Plaintiff's Claim Under the Rehabilitation Act

Plaintiff's first cause of action claims relief under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("section 504"). The Rehabilitation Act established "a comprehensive federal program aimed at improving the lot of the handicapped." Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 626 (1984). Among the Act's goals were the promotion and expansion of "em-

ployment opportunities in the public and private sectors." 29 U.S.C. § 701(8). In furtherance of these goals, Congress enacted section 504 of the Act, which provides, in pertinent part:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794.

Plaintiff claims that he is an otherwise qualified handicapped individual who has been denied employment solely on the basis of his handicap. He further alleges that he was subjected to such discrimination by Mason & Hanger and the Regents, who he alleges are contractors receiving federal financial assistance. Defendants claim that section 504 does not apply to Mason & Hanger, and urge this Court to grant their motion for summary judgment as to Count I of plaintiff's complaint.

Defendants do not contest that plaintiff is an "otherwise qualified handicapped individual" who has, "solely by reason of his handicap" been denied employment as a security inspector at LANL by Mason & Hanger. They contend, however, that Mason & Hanger's provision of a security force for LANL is not a "program or activity receiving Federal financial assistance," as specified in section 504. The term "federal financial assistance" is not defined in the Rehabilitation Act. Courts interpreting this language, however, have uniformly focused on the word "assistance" in determining whether a particular program or activity is required to conform to the mandates of the Act. See, e.g., Paralyzed Veterans of America v. C.A.B., 752 F.2d 694 (D.C. Cir.), cert. granted, 54 U.S.L.W. 3270 (U.S. Oct. 21, 1985); Frazier v. Board of

Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278 (5th Cir. 1985); Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984); Jacobson v. Delta Airlines, Inc., 742 F.2d 1202 (9th Cir. 1984), cert. dismissed, 53 U.S.L.W. 3790 (U.S. Apr. 27, 1985); United States v. Baylor University Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 53 U.S.L.W. 3528 (U.S. Jan. 21, 1985); Lemmo v. Wilson, 583 F.Supp. 557 (D. Colo. 1984); Bachman v. American Society of Clinical Pathologists, 577 F.Supp. 1257 (D. N.J. 1983); Cook v. Budget Rent-A-Car Corp., 502 F.Supp. 494 (S.D.N.Y. 1980); Rogers v. Frito-Lay, Inc., 433 F.Supp. 200 (N.D. Tex. 1977), aff'd on other grounds, 611 F.2d 1074 (5th Cir.), cert. denied, 449 U.S. 889 (1980).

In Cook v. Budget Rent-A-Car, plaintiff alleged that the defendant corporation had refused to rent him an automobile solely because of his handicap. He claimed that defendant was a recipient of federal financial assistance because it received funds from the federal government under automobile rental contracts with several federal agencies. The district court rejected plaintiff's claim under section 504 of the Rehabilitation Act, finding that the defendant was not a recipient of federal financial assistance. 502 F.Supp. at 502. Construing the plain language of the statute, the court stated that it found "the use of the specific word 'assistance' to be most striking. This word connotes such transactions as a transfer of government funds by way of a subsidy, or a sale of government assets at reduced consideration." Id. at 496. See also Hingson v. Pacific Southwest Airlines, supra at 1414 ("Government mail contracts, however, constitute 'federal financial assistance' for purposes of section 504 only if they involve a subsidy to the airline"); Lemmo v. Wilson, supra at 560 ("there is no 'assistance' where the government hires property at its fair market value").

Plaintiff points to the legislative history of the Atom-

ic Energy Act, 42 U.S.C. §§ 2011 et seq., to support his assertion that both the Regents and Mason & Hanger are recipients of federal financial assistance by virtue of Congress' determination to provide research assistance for research and development of the atomic energy industry. Even if LANL was established for the purpose of receiving Congressional assistance to the nuclear industry, however, LANL is not the "program or activity" at issue in this case. The Rehabilitation Act's ban on discrimination is limited to the specific program that receives federal funds. Consolidated Rail Corp. v. Darrone, supra at 636. Mason & Hanger denied employment to the plaintiff. Therefore, plaintiff's Rehabilitation Act claim can withstand the defendants' motion for summary judgment only if Mason & Hanger's provision of security personnel to LANL is a "program or activity receiving Federal financial assistance."

It is undisputed that the Department of Energy's purpose in replacing federal security personnel at LANL with personnel provided by a private subcontractor (Mason & Hanger) was not to provide assistance to the subcontractor, but rather to obtain necessary security services in a cost-effective and efficient manner. The House Subcommittee on Procurement and Military Nuclear Systems of the Committee on Armed Services heard testimony that the estimated savings to the government by contracting out guard services would be approximately $3,500,000 over a three-year contract period. Exhibit C, p. 13, Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and Summary Judgment. The contract between the University of California and Mason & Hanger stipulates that the goal of the University is to have the subcontractor perform assigned tasks at the most cost effective level of professional proficiency obtainable. Exhibit B, Part III, C § (6), p. 7, Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and Summary Judgment. Nowhere in the contract between the Depart-

ment of Energy and the Board of Regents, in the contract between the Board of Regents and Mason & Hanger, or in the proceedings before the House Subcommittee on Procurement and Military Nuclear Systems of the Committee on Armed Services is it suggested that the purpose of subcontract for security personnel at LANL is "assistance" in any sense of that word.

Straightforward statutory construction suggests that Mason & Hanger was not the recipient of "federal financial assistance" and, therefore, not subject to section 504 of the Rehabilitation Act. Furthermore, the administrative regulations implementing section 504 direct the same conclusion. Each department of the federal government was charged with developing regulations implementing the Rehabilitation Act. The department [sic] of Energy regulations implementing nondiscrimination statutes including the Rehabilitation Act explicitly state that such implementing regulations do not apply to "Procurement contracts under Title 41 CFR Part 1 or Part 9." 10 C.F.R. § 1040.2(b)(3)(1985).[1]

Procurement is defined in 41 C.F.R. § 1-1.209 (1984):

> 'Procurement' means the acquisition

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[1] In excluding procurement contracts from programs or activities to which the nondiscrimination provisions apply, the Department of Energy regulations are consistent with those of other governmental departments. See, e.g., 45 C.F.R. § 84.3(h) (1985) (Department of Health and Human Services); 29 C.F.R. § 32.3 (1985) (Department of Labor); 7 C.F.R. § 15b.3(g) (1985) (Department of Agriculture); 32 C.F.R. § 56.3(b) (1985) (Department of Defense); 43 C.F.R. § 17.202 (h) (1985) (Department of Interior); 28 C.F.R. § 42.540(f) (1985) (Department of Justice); 22 C.F.R. § 142.3(h) (1985) (Department of State); 38 C.F.R. § 18.403(h) (1985) (Veterans Administration). Construction of the statute by a department charged with its administration is traditionally given great deference on judicial review. New York State Department of Social Services v. Dublino, 413 U.S. 405, 421 (1973).

> (and directly related matters), from non-Federal sources, of personal property and nonpersonal services (including construction) by such means as purchasing, renting, leasing (including real property), contracting, or bartering, but not by seizure, condemnation, donation, or requisition.

Furthermore, subpart 9 provides that a procurement contract "shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever (1) the principal purpose of the instrument is the acquisition by purchase, lease, or barter, of property, or services for the direct benefit or use of the Federal Government." 41 C.F.R. § 9-1.5102(b)(1984).

Applying these definitions, the governmental regulations define contracts such as the one between the Regents and Mason & Hanger as procurement contracts. The word "procurement" is also used repeatedly at the proceedings before the House Subcommittee on Armed Services, to characterize the proposed contract for the provisions of security personnel at LANL. See, e.g., Statement on Behalf of Los Alamos Protective Force Members to a Hearing of the U.S. House Armed Services Committee, Los Alamos, New Mexico, January 9, 1981, p. 33 ("This procurement is for a defense effort"); Enclosure 1, Proposal Contracting For Certain Guard-Related Functions at Los Alamos, Exhibit 4, p. 6 ("LAAO Counsel is of the opinion that a competitive procurement is the only viable approach"; "it is very desirable to complete the procurement process as soon as possible"); Fact Sheet Concerning Contracting Out Selected Guard Functions at Los Alamos, Exhibit 12, p. 2 ("The guard service will be secured through the competitive procurement process"). Mason & Hanger's contract for provision of security personnel to LANL is a

procurement contract.

Although construction of the Department of Energy's exclusion of procurement contracts from programs and activities subject to the nondiscrimination statutes appears to be a matter of first impression, other departmental regulations excluding procurement contracts have been upheld on judicial review. See, e.g., Jacobson v. Delta Airlines, Inc., supra at 1209. ("The relevant legislative history leaves no doubt that the HEW's definition of federal financial assistance as not including procurement contracts is correct"). See also Rogers v. Frito-Lay, Inc., supra. Furthermore, "neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). Procurement contracts are not federal financial assistance. Therefore, Mason & Hanger's procurement contract with the Board of Regents for the provision of security personnel at LANL is not a "program or activity receiving Federal financial assistance," and section 504 of the Rehabilitation Act does not apply. Defendants' motion for summary judgment as to plaintiff's Rehabilitation Act claim is well-taken and will be granted.

II. Defendants' Challenge to Plaintiff's § 1983 Claim

Defendants move to dismiss, or, if matters outside the pleadings are considered, for summary judgment, as to Count III of plaintiff's complaint, in which he alleges a cause of action for unconstitutional conduct by the defendants in violation of 42 U.S.C. § 1983. Defendants challenge plaintiff's section 1983 claim on three grounds: first, they claim that insofar as plaintiff seeks relief under section 504 of the Rehabilitation Act as the basis for his section 1983 claim, he has failed to state a claim for which relief may be granted; second, the defendants were not acting "under color of state law," and therefore plaintiff's section 1983 claim must fail; and, third, de-

fendants are entitled to qualified, or "good faith" immunity for their conduct in reasonably relying on a valid governmental regulation, and plaintiff's section 1983 claim is, therefore, barred.

First, defendants argue that plaintiff seeks enforcement of rights under section 504 of the Rehabilitation Act as one of the bases of his section 1983 claim, and that the rights asserted by the plaintiff are governed by section 503 of the Act, not section 504. Section 503 imposes on federal contractors an affirmative obligation to hire the handicapped. Defendants claim that rights governed by section 503 are not cognizable under section 504 of the Rehabilitation Act, so cannot form the basis for a section 1983 claim. Insofar as defendants are arguing that a claim which could be brought under section 503 of the Rehabilitation Act precludes a claim under section 504, their contention is refuted by 41 C.F.R. § 60-741.1 (1985), which provides:

> Compliance of a contractor with the provisions of this part [requiring compliance with section 503] will not necessarily determine its compliance with the requirements of section 504 of the Rehabilitation Act of 1973[.]

Insofar as defendants are arguing that there is no private right of action under section 504 of the Rehabilitation Act, their contention is refuted by Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1380 (10th Cir. 1981). Furthermore, in Pushkin, the Tenth Circuit Court of Appeals recognized that a cause of action under section 1983 could be based on a violation of substantive rights conferred by section 504 of the Rehabilitation Act. Id. at 1382.

Nevertheless, defendants' contention that plaintiff's Third Cause of Action has failed to state a claim for which relief may be granted is well-founded insofar as

plaintiff's claim is based upon violations of the Rehabilitation Act, because Mason & Hanger is not a recipient of "federal financial assistance." See discussion in Part I, supra. Plaintiff cannot circumvent the requirements of the Rehabilitation Act by pleading the same cause of action again under section 1983. Defendants' motion to dismiss plaintiff's Count III insofar as plaintiff relies on a violation of section 504 of the Rehabilitation [Act] [sic] is well-taken and will, therefore, be granted.

In Count III plaintiff also alleges that defendants discriminated against him, in violation of his constitutional right to equal protection of the laws and freedom of association. In order for the plaintiff to state a cause of action, the defendants' conduct must constitute action "under color of state law." Defendants claim that the remainder of plaintiff's section 1983 action should fail because they were not acting "under color of state law."

The United States Supreme Court has articulated a two-part inquiry to determine whether conduct that allegedly caused a constitutional deprivation can be fairly attributable to the State: "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible .... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982).

In this case, the two-part Lugar test for state action is satisfied. Defendants do not dispute that the Regents of the University of California and the LANL defendants are state actors; they challenge, however, plaintiff's characterization of the actions of the DOE defendants and Mason & Hanger as "state action." Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and for Summary Judgment, 42-43. Plaintiff alleges a conspiracy between all the defendants to deprive

him of his civil rights. Both federal actors (the DOE defendants) and private actors (Mason & Hanger), "jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." Adickes v. Kress & Co., 398 U.S. 144, 152 (1970) (citing United States v. Price, 383 U.S. 787, 794 (1966)). Therefore, all the defendants are state actors for purposes of the second prong of the Lugar test.

The first inquiry of the Lugar test is also satisfied, because the conduct of which plaintiff complains resulted from "a rule of conduct having its source in state authority." Gilmore v. Salt Lake Community Action Program, 710 F.2d 632, 638 (10th Cir. 1983). LANL is organized under a contract between the DOE and the Regents of the University of California. Exhibit A, Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and for Summary Judgment. Mason & Hanger provides security personnel to LANL pursuant to a contract between the Regents and Mason & Hanger. Exhibit B, Brief in Support of Defendants' Motion to Dismiss the first Amended Complaint and for Summary Judgment. Mason & Hanger is required to implement federal regulations in hiring security personnel for Los Alamos. Id. at 39, 40, 44, Appendix B at 4. Because a State may be held responsible for private decisions when it has exercised coercive power or provided significant encouragement for those decisions, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982), the Regents' decision to enter into a contract with the DOE, and their enforcement of federal regulations in their contract with Mason & Hanger, can be deemed to be state action, and therefore satisfy the first prong of the Lugar test. Defendants' contention that the DOE defendants and Mason & Hanger are not state actors is, therefore, without merit, and their motion for summary

judgment as to Count III of plaintiff's Complaint on this basis will be denied.

Finally, defendants contend that they are entitled to qualified, or "good faith" immunity, because of their reasonable reliance on a valid regulation, interim [sic] Management Directive 6102 (IMD 6102). "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Defendants have produced no evidence, however, of their reliance on IMD 6102. Although counsel for defendants argue that defendants reasonably relied on IMD 6102 in denying employment to the plaintiff, the arguments of counsel are not evidence. Furthermore, Count III includes more than merely a claim that defendants' conduct in applying IMD 6102 was unconstitutional; plaintiff claims violations of his constitutional rights of equal protection and freedom of association. Defendants' claims of good faith immunity do not apply to these constitutional claims under section 1983. Defendants' motion to dismiss Count III on the basis of qualified immunity is, therefore, without merit and will be denied.

III. Defendants' Challenge to Plaintiff's Bivens Action

Defendants move to dismiss Count IV of plaintiff's Complaint, in which he alleges a cause of action for conduct by the defendants in violation of the Fifth Amendment to the Constitution. The United States Supreme Court established that victims of a constitutional violation by a federal agent have the right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971). See also Carlson v. Green, 446 U.S. 14, 18 (1980); Davis v. Passman, 442

U.S. 228 (1979). Nevertheless, defendants move to dismiss plaintiff's Bivens action on three grounds: first, that insofar as plaintiff can obtain the same relief, if at all, under 42 U.S.C. § 1983, he is limited to remedies under that statute; second, neither the LANL defendants nor the Mason & Hanger defendants are "federal agents;" and, third, defendants are entitled to qualified, or "good faith" immunity for their conduct in reasonably relying on a valid governmental regulation, thus barring plaintiff's Bivens action.

First, defendants argue that plaintiff's claim for relief under 42 U.S.C. § 1983 (Count III) precludes his action directly under the Constitution in Count IV. The conduct forming the basis for plaintiff's claim in Count III also forms the basis of his claim in Count IV; the relief sought in Count III is identical to the relief sought in Count IV; the constitutional rights alleged by plaintiff to have been violated in Count III are reiterated in Count IV. The only difference between the two counts is plaintiff's characterization of the parties as federal actors in Count IV. Nevertheless, plaintiff has properly plead [sic] a Bivens cause of action in Count IV.

In Carlson v. Green, supra, the United States Supreme Court ruled that a Bivens action was properly brought, despite the availability of a cause of action under the Federal Tort Claims Act. In determining that the FTCA did not provide an exclusive remedy, the Court required an "explicit congressional declaration" that the remedy was intended to be exclusive. Id. at 19. In the present case, there is similarly no evidence that Congress intended the remedy created in 42 U.S.C. § 1983 to be exclusive. Although it is clear that plaintiff may not recover twice for the same injury alleged in Counts III and IV of his Complaint, he has properly stated a Bivens action, and such action will be not be precluded by his cause of action under section 1983.

Second, defendants claim that plaintiff's cause of

action under the Constitution must fail because neither the LANL defendants nor the Mason & Hanger defendants are "federal agents." Defendants do not dispute that the DOE defendants are federal agents. Plaintiff alleges a conspiracy between all the defendants to deprive him of his constitutional rights. Therefore, under the analysis of Adickes v. Kress & Co., supra, see Part II, supra, when state actors jointly engage with federal actors in the prohibited action, the state actors are "federal actors" for purposes of the Bivens cause of action. It is not necessary that every participant in the allegedly unconstitutional conduct be a federal agent to state a valid Bivens action, just as it is not necessary that every actor be a state actor for an action under section 1983. It is sufficient that the state actors be willful participants in joint activity with the federal agents.

Finally, defendants contend that they are entitled to qualified immunity, under Harlow v. Fitzgerald, supra, because of their reasonable reliance on a valid regulation. As in the analysis of this defense with respect to plaintiff's section 1983 claim, however, defendants have produced no evidence of their reliance on IMD 6102. Defendants' motion to dismiss Count IV is, therefore, without merit and will be denied.

IV. Defendants' Claim of Eleventh Amendment Immunity

Defendants move to dismiss plaintiff's complaint, claiming that they are immune from liability under the Eleventh Amendment.[2] Suit against the State and agencies of the State is barred by the Eleventh Amendment unless the State has consented to the filing of such a

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[2] Although only LANL has raised the defense of immunity under the Eleventh Amendment, this Court will consider the defense as it applies to all of the defendants, because an Eleventh Amendment defense is jurisdictional. Garcia v. Board of Education of the Socorro Consolidated School District, 777 F.2d 1403, 1405 (10th Cir. 1985).

suit. Alabama v. Pugh, 438 U.S. 781, 782 (1978). "This jurisdictional bar applies regardless of the nature of the relief sought." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984).

The Regents of the University of California are organized under the laws of the State of California. Cal.Const., Art. IX, § 9(a). Although the State of California is not a named defendant in this action, state agencies or individual officials may be protected by the State's Eleventh Amendment immunity "when the action is in essence for the recovery of money from the state[.]" Quern v. Jordan, 440 U.S. 332, 345 n. 17 (1979). As this Court stated in Johnson v. Regents of the University of California, No. Civ 82-139 HB, slip op. at 3 (D. N.M. July 21, 1982), "[s]everal courts have analyzed those 'powers, characteristics and relationships created by state law' and have concluded that the Regents of the University of California is an 'arm of the state,' immune from suit under the Eleventh Amendment." (quoting Vaughn v. Regents of the University of California, 504 F.Supp. 1349, 1352 (E.D. Cal. 1981). See also Moxley v. Vernot, 555 F.Supp. 554, 560 (S.D. Ohio 1982); Selman v. Harvard Medical School, 494 F.Supp. 603, 615 (S.D.N.Y.), aff'd mem., 636 F.2d 1204 (2d Cir. 1980).

By extension, LANL is also an arm of the state for purposes of Eleventh Amendment immunity, because all obligations incurred by LANL are paid by the Regents pursuant to the Regents' contract with the DOE. Exhibit A, Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and for Summary Judgment, 8-9. Defendants' motion to dismiss will, therefore, be granted as to the Regents and LANL. Although the Eleventh Amendment also bars suits for retroactive relief against individuals in their official capacities, Edelman v. Jordan, supra at 666-67, and Counts III and IV of plaintiff's Complaint seek retroactive relief in the form of compensatory and punitive damages, defendants'

motion to dismiss will be denied as to the LANL defendants Donald Kerr, Robert Pogna and Ed C. Walterscheid, who were sued in their individual capacities only. Ex Parte Young, 209 U.S. 123 (1908).

V. Defendants' Claim of Sovereign Immunity

The DOE defendants (DOE, Donald Paul Hodel, and Gary Granere) move to dismiss plaintiff's complaint, claiming that they are immune from liability under the doctrine of sovereign immunity. It is well-settled that the United States, as a sovereign, is immune from suit unless it consents to be sued. United States v. Sherwood, 312 U.S. 584, 586 (1941). Furthermore, a suit against a federal agency or a federal employee will be deemed a suit against the United States "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." Dugan v. Rank, 372 U.S. 609, 620 (1963) [citations omitted.]

In Counts III and IV, plaintiff seeks compensatory and punitive damages from the DOE defendants. Donald Paul Hodel and Gary Granere are sued in their official and individual capacities. A suit against government employees in their official capacities is essentially a suit against the United States. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Therefore, insofar as plaintiff seeks monetary damages against the DOE and Donald Paul Hodel and Gary Granere in their official capacities, his suit is barred by the sovereign immunity of the United States. See Land v. Dollar, 330 U.S. 731, 738 (1947).

Congress has, however, consented to suits for injunctive relief brought against federal agencies, or federal employees. 5 U.S.C. § 702 (1976). Section 702 eliminates the defense of sovereign immunity in actions for specific, non-monetary relief. Ghandi v. Police Depart-

ment of the City of Detroit, 747 F.2d 338, 343 (6th Cir. 1984). See also Ogden v. United States, 758 F.2d 1168, 1177 (7th Cir. 1985). In Count II of his Complaint, plaintiff seeks injunctive relief. His action in Count II against the Doe defendants is not, therefore, barred by sovereign immunity.

Finally, insofar as plaintiff seeks monetary damages from Donald Paul Hodel and Gary Granere in their individual capacities, his action is not barred by sovereign immunity. See New Mexico v. Regan, 745 F.2d 1318, 1320 (10th Cir. 1984, cert. denied, 53 U.S.L.W. 3776 (U.S. Apr. 29, 1985). "The doctrine of sovereign immunity is not a bar to such an action since the judgment need not be satisfied by the public treasury." Newhouse v. Probert, 608 F.Supp. 978, 981 (W.D. Mich. 1985). Therefore, the DOE defendants' motion to dismiss on the grounds of sovereign immunity will be granted insofar as plaintiff seeks monetary damages against the DOE and Donald Paul Hodel and Gary Granere in their official capacities, and denied insofar as plaintiff requests injunctive relief. The motion will also be denied insofar as plaintiff seeks monetary relief against Donald Paul Hodel and Gary Granere in their individual capacities.

VI. Plaintiff's Challenge to IMD 6102

Defendants move for summary judgment as to Count II of plaintiff's complaint, which alleges that the DOE regulation Interim Management Directive No. 6102 is unconstitutional. IMD 6102 provides medical standards for various protective personnel, including security inspectors, and compliance with these standards by personnel hired by Mason & Hanger is mandated by the DOE. Affidavit of Alfredo DeVargas, filed May 16, 1985, Exhibits 2, 4 and 5. The regulation provides that "[a] one-eyed individual shall be medically disqualified for security inspector duties." IMD 6102 § A 6 b (8), Exhibit 4, First Amended Complaint. Defendant Hook, Administrative Manager for Mason & Hanger, cited IMD 6102

as the reason for his rejection of plaintiff's application for employment in his letter to plaintiff dated November 24, 1981. Affidavit of Alfredo DeVargas, filed May 16, 1985, Exhibit 1.

Plaintiff challenges the constitutionality of IMD 6102 on three grounds. First, plaintiff claims that the regulation violates Section 504 of the Rehabilitation Act. Section 504, however, is inapplicable in this context. That section applies only to recipients of "federal financial assistance," as discussed in Part I, supra. Although IMD 6102 regulates personnel hired by Mason & Hanger, Mason & Hanger is paid pursuant to a procurement contract with LANL, not "federal financial assistance." Therefore, Section 504 does not apply to IMD 6102 medical standards for security personnel provided to LANL by Mason & Hanger.

Plaintiff also claims that IMD 6102 violates his rights to the equal protection of the laws guaranteed by the Fifth Amendment. The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. Const. Amend. V. "In numerous decisions, this Court has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws." Davis v. Passman, supra at 234. Plaintiff contends that IMD 6102 is unconstitutional because it discriminates against the handicapped.

Handicapped persons do not constitute a suspect class for purposes of established equal protection analysis. Brown v. Sibley, 650 F.2d 760, 766 (5th Cir. 1981). Furthermore, there is no fundamental constitutional right to employment. Coleman v. Darden, 595 F.2d 533, 538 (10th Cir.), cert. denied, 444 U.S. 927 (1979). Therefore, in the absence of a suspect classification and a fundamental right, the only inquiry is whether the classification scheme embodied in IMD 6102 is rationally related to the objectives of the governmental agency (the DOE).

"The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the [agency's] objective." McGowan v. Maryland, 366 U.S. 420, 425 (1961).

The security inspectors regulated by IMD 6102 are required to operate vehicles, communication systems, alarm systems, weapons and riot control equipment, among many other duties connected with protecting classified material and special nuclear material at Los Alamos Laboratory. Affidavit of Alfredo DeVargas, filed May 16, 1985, Exhibit 2. Congress' concern about the protection of nuclear and classified material from terrorists [sic] attack and other hazards is documented in the Proceedings Before the Subcommittee on Procurement and Military Nuclear Systems of the Committee on Armed Services of the United States House of Representatives, on January 9, 1981, Exhibit C., Brief in Support of Defendants' Motion for Summary Judgment, pp. 17-18, 23-25, 30 (dialogue between Congressman Daniel and Thomas R. Clark, Deputy Manager, Albuquerque Operations Office, DOE). The DOE's underlying assumption that sight is required for certain of the skills demanded of security inspectors at LANL cannot be said to be irrational; as in Brown v. Sibley, supra, the DOE "reasonably could assume that a sighted person could more safely and proficiently perform those skills than could one with a disabling visual impairment." IMD 6102 is rationally related to legitimate governmental goals, and is, therefore, constitutional. Defendants' motion for summary judgment as to plaintiff's Count II claim that IMD 6102 is facially unconstitutional will, therefore, be granted.

Finally, plaintiff claims that even if IMD is facially constitutional, it is unconstitutional as applied to him. He bases this contention on Mason & Hanger's failure to follow the discretionary procedures outlined in IMD 6102 § A 6 c, which provides:

> Despite an initial indication of medical disqualification, examinees may be considered for medical qualification when, in the judgment of the designated physician, a thorough history, supplemental physical examination and other appropriate laboratory test [sic] and medical investigative procedures indicate that the examinee can safely and effectively perform all normal and emergency job duties; and provided that the designated physician determines that all such duties are within the physical capability and exercise tolerance of the examinee.

Defendants stipulate that the above procedures were not followed in plaintiff's case. Reply Brief of all Defendants in Support of their Motion to Dismiss the First Amended Complaint and for Summary Judgment, 5. They acknowledge that plaintiff did not see a doctor before he was medically disqualified for the position of security inspector. Id. at 26. Although defendants argue that the above procedures are applicable only when an initial indication of a disqualifying condition is "medically in error," id., the language of the regulations does not limit review to medical errors.

Defendants claim, however, that they are entitled to qualified, or "good faith" immunity, for their reasonable reliance on a valid regulation. See Harlow v. Fitzgerald, supra at 817-19. In Count II, plaintiff seeks primarily prospective injunctive and declaratory relief; he requests a declaration that IMD 6102 is facially unconstitutional, or unconstitutional as applied to him, and requests an injunction requiring Mason & Hanger to process his application for employment and to hire him if he passes the proper criteria for a security inspector. Immunity does not bar a request for prospective injunctive relief. Pulliam v. Allen, 466 U.S. 522, 541-42 (1984). It is un-

necessary, therefore, to determine whether defendants are entitled to qualified immunity in this context.

Insofar as plaintiff also requests retroactive relief in the form of a request for back pay in Count II, defendants' claim of qualified immunity is not barred. Nevertheless, defendants have produced no evidence showing reasonable reliance on a valid regulation. Although counsel for defendants argue that defendants reasonably relied on IMD 6102 in denying employment to the plaintiff, the arguments of counsel are not evidence. Defendants' Motion to Dismiss Plaintiff's Count II claim that IMD 6102 is unconstitutional as applied to him will, therefore, be denied.

VII. Defendant Granere's Motion to Dismiss and/or Summary Judgment

Defendant Granere moves to dismiss plaintiff's third cause of action, or, in the event matters outside the pleadings are considered, for summary judgment as to Count III. Defendant Granere contends that his motion should be granted for either of two reasons: first, because plaintiff has failed to allege specific facts supporting his claim of a constitutional violation by the defendant; and, second, because defendant Granere is entitled to qualified immunity under Harlow v. Fitzgerald, supra. Defendant's arguments lack merit, and his motion, therefore, will be denied.[3]

Defendant argues that plaintiff has failed to make a prima facie showing of unconstitutional conduct by defendant Granere, and that plaintiff has, therefore, failed to state a claim under 42 U.S.C. § 1983. Defendant cor-

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[3] In his Reply Brief in Support of Motion to Dismiss, defendant Granere also contends for the first time that plaintiff has failed to exhaust his administrative remedies, as required under Executive Order 11246. Because plaintiff has not been afforded the opportunity to respond to this argument, it will not be addressed by this Court.

rectly states that mere conclusory allegations are not sufficient to state a claim under 42 U.S.C. § 1983. See Taylor v. Nichols, 558 F.2d 561, 566 (10th Cir. 1977). Nevertheless, plaintiff's complaint is sufficiently specific to withstand defendant's motion to dismiss.

In Count III, plaintiff alleges that defendant Hook falsely stated that persons with only one eye were automatically medically disqualified from employment as security inspectors. ¶ 39, Amended Complaint. He also alleges that defendant Hook acted beyond his authority as a supervisor in making the determination of medical disqualification, and thereby acted in violation of federal regulations. Id. Plaintiff alleges that defendant Granere and the other defendants authorized, acquiesced or ratified the above conduct. Id. at ¶ 40. Plaintiff also alleges that defendant Granere, and the other DOE and LANL defendants, authorized, acquiesced, or ratified employment discrimination against persons on the basis of their Spanish-American ancestry, physical handicap, age, and sex. Id. at ¶ 41. Plaintiff further alleges that the defendants authorized, acquiesced, or ratified the decision to bar the plaintiff from employment on the alleged basis of his handicap, while aware of plaintiff's association with his brother, and his brother's outspoken political views. Id. at ¶ 42. Plaintiff also alleges that defendant Granere conspired with the other defendants to deprive plaintiff of his First, Fifth, and Fourteenth Amendment rights. Id. at ¶ 43. Plaintiff alleges that the defendants were acting pursuant to a policy or custom and course of conduct condoning discrimination. Id. at ¶ 44. Finally, plaintiff alleges that defendant Granere failed to adequately supervise the Mason & Hanger and LANL defendants and their employees not to engage in discriminatory conduct, id. at ¶ 46, and that defendant's actions were intentional and willful. Id. at ¶ 45.

Defendant Granere acknowledges that he was Acting Area Manager of the DOE Los Alamos Area Office

when plaintiff applied for employment with Mason & Hanger. Granere Declaration, Motion of Gary Granere to Dismiss, or in the alternative, for Summary Judgment. The Area Manager is responsible for having knowledge of such staff specializations as personnel, Attachment 1, Motion of Gary Granere to Dismiss, and "directs an organization essential to adequately fulfill all DOE responsibilities involved in the support of the Los Alamos Scientific Laboratory activities and the necessary related . . . personnel . . . services." Id. Furthermore, the Deputy Area Manager is responsible for administering subcontract operations, and is jointly responsible for directing all activities of the Area Office, including related personnel operations. Attachment 2, Motion of Gary Granere to Dismiss, 2.

Plaintiff has alleged the actions of defendant Hook with specificity. See Plaintiff's Amended Complaint, ¶ 39. His allegations that defendant Granere authorized, acquiesced or ratified those actions are, therefore, sufficiently specific to withstand defendant Granere's motion, particularly since it is undisputed that the defendant was responsible for overseeing Mason & Hanger's actions as part of his responsibility for the activities of subcontract operations.

Defendant Granere also contends that he is entitled to qualified, or "good faith" immunity, because any act which he might have committed was carried out within the scope of his official, discretionary duties. Although defendant correctly points out that qualified immunity may be accorded to government officials performing discretionary functions, such immunity is only available insofar as the officials' conduct "does not violate clearly establish [sic] statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, supra at 818. In this case, plaintiff alleges a deprivation of his constitutional rights not to be discriminated against because of handicap, national origin, or as-

sociation. These are established constitutional rights. In this case, defendant "could be expected to know that certain conduct would violate . . . constitutional rights," id. at 819, so the Harlow doctrine of qualified immunity is inapplicable. Defendant's motion to dismiss is, therefore, without merit and will be denied.

VIII. Various Other Motions

Finally, the parties made four other motions which are readily disposed of. First, the DOE and the Regents move to dismiss the fictitious defendants, or to strike all allegations concerning the fictitious defendants. Plaintiff's Amended Complaint names John Does One and Two, employees of the Department of Energy, and Richard Roes One and Two, employees of LANL. Plaintiff agrees that he has no intention of naming any other individuals as parties to this lawsuit. Defendants' motion, therefore, shall be granted, by agreement of the parties.

Second, defendants filed a Supplemental Motion to Dismiss all claims under the Federal Rehabilitation Act of 1973, on the grounds that plaintiff has failed to exhaust his administrative remedies. This Court has already granted defendants' Motion for Summary Judgment as to plaintiff's claim under the Rehabilitation Act, see, Part I, supra. Defendants' motion will, therefore, be denied as moot.

Third, the United States moves to dismiss this action against Donald Paul Hodel in his individual capacity, for lack of personal jurisdiction and/or insufficiency of service of process. This motion is well-taken. Plaintiff concedes that he was unable to document service upon defendant Hodel in his individual capacity. Plaintiff's claim against defendant Hodel in his individual capacity, therefore, shall be dismissed.

Finally, plaintiff moves for relief pursuant to Fed. R. Civ. P. 56(f). Specifically, plaintiff requests this Court to

order a continuance to permit plaintiff to undertake limited discovery on the issues raised by defendants' Motion for Summary Judgment. Plaintiff's motion is not well-taken. This Court has already denied a virtually identical motion by the plaintiff. See DeVargas v. Mason & Hanger-Silas, Civ. No. 83-1674, slip op. at 6 (D. N.M. May 6, 1985). Plaintiff may not seek to avoid this Court's Order by restating a motion for discovery, when further discovery has been abated, pending a ruling on the motions presently before this Court. Furthermore, plaintiff seeks additional discovery for the purpose of proving that Mason & Hanger is the recipient of "federal financial assistance." In light of the disposition of plaintiff's claim under the Rehabilitation Act in Part I, supra, such further factual development is unnecessary. Plaintiff's motion for Rule 56(f) relief, therefore, will be denied.

Now, Therefore,

IT IS BY THE COURT ORDERED that:

(1) defendants' Motion for Summary Judgment shall be granted as to Count I of Plaintiff's Complaint, seeking relief under section 504 of the Rehabilitation Act of 1973;

(2) defendants' Motion for Summary Judgment shall be granted insofar as plaintiff relies on a violation of section 504 of the Rehabilitation Act as part of his claim in Count III under 42 U.S.C. § 1983, but denied as to the remainder of plaintiff's section 1983 claim in Count III;

(3) defendants' Motion to Dismiss plaintiff's Bivens action in Count IV shall be denied;

(4) defendants' Motion to Dismiss on the basis of Eleventh Amendment immunity shall be granted as to the Regents and LANL, and denied as to the other defendants;

(5) defendants' motion to dismiss on the basis of sovereign immunity shall be granted as to the Department of Energy, and Donald Paul Hodel and Gary Granere in their official capacities insofar as plaintiff seeks compensatory and punitive damages, but denied insofar as plaintiff seeks injunctive relief;

(6) defendants' Motion for Summary Judgment as to plaintiff's constitutional challenge to Interim Management Directive 6102 shall be granted insofar as plaintiff claims that the directive is facially unconstitutional, and denied insofar as plaintiff alleges that the regulation was unconstitutional as applied to him;

(7) defendant Gary Granere's motion to dismiss shall be denied;

(8) defendants DOE and the Regents' motion to dismiss the fictitious defendants shall be granted;

(9) defendants' Supplemental Motion to Dismiss all claims under the Rehabilitation Act shall be denied as moot;

(10) defendant Donald Paul Hodel's motion to dismiss for insufficiency of service of process shall be granted;

(11) and plaintiff's motion for Rule 56(f) relief shall be denied.

s/s
Chief Judge

[Filed April 9, 1986]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CV No. 83-1674 HB

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK, individually and in his official capacity; DON HARDWICK, individually and in his official capacity; THE UNITED STATES DEPARTMENT OF ENERGY, DONALD PAUL HODEL, individually and in his official capacity; GARY GRANERE, individually and in his official capacity; LOS ALAMOS NATIONAL LABORATORY; REGENTS OF THE UNIVERSITY OF CALIFORNIA; DONALD KERR, in his individual capacity; and ED C. WALTERSCHEID, in his official capacity,

Defendants.

JUDGMENT

This matter having come before the Court on defendants' motion to dismiss on the basis of Eleventh Amendment immunity, and the court having entered its memorandum opinion finding that the motion should be granted;

Now, Therefore,

IT IS BY THE COURT ORDERED that judgment

is hereby entered in the above-captioned case in favor of defendants Los Alamos National Laboratory and Regents of the University of California.

s/s
Chief Judge

[Filed April 9, 1986]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CIV No. 83-1674 JP

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; THE UNITED STATES DEPARTMENT OF ENERGY; JOHN S. HERRINGTON; GARY GRANERE; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Defendants.

MEMORANDUM OPINION AND ORDER

The subject of this memorandum opinion is defendants' Motion to Dismiss the Second Amended Complaint and for Summary Judgment. Having reviewed the motion, the memoranda and exhibits submitted by the parties, and having consulted the applicable authorities, I conclude that defendants' motion should be granted.

This is a civil rights action arising out of the refusal by defendants Mason & Hanger-Silas Mason Co., Inc. and its employees, T. R. Hook and Don Hardwick ("the Mason & Hanger defendants"), to consider plaintiff's application for a position as security inspector at the Los Alamos National Laboratory ("LANL") facilities in Los Alamos, New Mexico. Mason & Hanger is a private corporation that employs individuals as security inspectors at LANL pursuant to a subcontract with LANL. Under a contract between the United States Department of Energy ("DOE") and the Regents of the University of California, LANL was organized to engage in weapons

and atomic energy research.

Plaintiff has only one eye. He unsuccessfully applied for employment at Mason & Hanger in November, 1981 and again in 1983. The Mason & Hanger defendants refused to process plaintiffs' [sic] employment application, relying on a then-applicable DOE regulation, Interim Management Directive No. 6102 Appendix IV (IMD 6102), which provided that "[a] one-eyed individual shall be medically disqualified for security inspector duties." IMD 6102 § A 6 b (8). Plaintiff sued under both 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971), alleging that the refusal to hire him violated his civil rights. Plaintiff sought damages, and injunctive and declaratory relief.

The procedural history of this case is somewhat complex. In October, 1986 Judge Bratton, the judge to whom this case was then assigned, granted summary judgment on the issue of qualified immunity in favor of the remaining DOE and LANL defendants[1] as to plaintiff's claim for damages. Judge Bratton denied the motion for summary judgment as to defendants Hook, Hardwick and Mason & Hanger, ruling that private parties were not entitled to assert the defense of qualified immunity. Defendants sought interlocutory review of the denial of qualified immunity under Mitchell v. Forsyth, 472 U.S. 511 (1985), and the Tenth Circuit Court of Appeals reversed. DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988) (De-

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[1] Judge Bratton had previously dismissed plaintiff's claims against the Regents and LANL on the ground that they were entitled to immunity under the Eleventh Amendment. He also dismissed plaintiff's damages claims against DOE and the DOE defendants who had been sued in their official capacities, because those claims were barred by the doctrine of sovereign immunity. Judge Bratton did not dismiss claims for declaratory and injunctive relief brought against the DOE and LANL defendants in their individual capacities.

Vargas). The court of appeals held that the defense of qualified immunity was available to private party defendants who acted in accordance with the duties imposed by a contract with a governmental body, 844 F.2d at 722, and determined that defendants Hook, Hardwick and Mason & Hanger were entitled to qualified immunity because they did not violate a "clearly established right" of which a reasonable defendant would be aware. Id. at 724. The court of appeals remanded "for trial on such equitable claims as remain before the district court." Id. at 725.

Three days before the Tenth Circuit handed down its decision, I granted plaintiff's motion for leave to file a Second Amended Complaint. Plaintiff's Second Amended Complaint asserts a new theory of liability under 42 U.S.C. § 1983 based on an alleged violation of section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793. In addition, plaintiff has amended his claim for declaratory and injunctive relief, and "clarified" the Fourteenth Amendment claims previously asserted under 42 U.S.C. § 1983. All of the defendants join in the present motion to dismiss the Second Amended Complaint and for summary judgment on all claims contained in the Second Amended Complaint. Because I find that defendants are entitled to qualified immunity as to plaintiff's claims for damages, and plaintiff's remaining claims for declaratory and injunctive relief either fail to state a claim or are premature, defendants' motion will be granted.

I. Qualified Immunity

The defense of qualified immunity, as articulated by the United States Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), provides that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." As discussed

above, the Tenth Circuit ruled in DeVargas that this defense was available to the private party defendants in this case. Plaintiff argues that the Tenth Circuit's ruling is not dispositive of the present motion, because the Tenth Circuit did not address the applicability of the defense of qualified immunity to plaintiff's claim under 42 U.S.C. § 1983 based on a violation of section 503 of the Rehabilitation Act. It is true that the Tenth Circuit did not decide whether qualified immunity barred plaintiff's action for damages under 42 U.S.C. § 1983 based on a violation of section 503 of the Rehabilitation Act. DeVargas, 844 F.2d at 725 n. 23. Nevertheless, the Tenth Circuit's reasoning applies equally well to plaintiff's present claim, and necessitates the same result.

Section 503 of the Rehabilitation Act mandates that all contracts in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals. Plaintiff contends that under section 503 and its implementing regulations, a government contractor could not discriminate against an otherwise qualified handicapped applicant for employment on the basis of his handicap. Therefore, plaintiff argues that defendants violated clearly established law when they denied his application for employment because he had the handicap of lacking one eye.

Plaintiff's argument fails for any of three reasons. First, it cannot be said that section 503 "clearly established" an individual's right to affirmative action in his or her particular case. Indeed, every circuit court that has addressed the question has concluded that no private right of action exists to enforce section 503. See Hodges v. Atchison, Topeka and Santa Fe Railway Co., 728 F.2d

414 (10th Cir.), cert. denied, 469 U.S. 822 (1984); D'Amato v. Wisconsin Gas Co., 760 F.2d 1474 (7th Cir. 1985); Painter v. Horne Brothers, Inc., 710 F.2d 143 (4th Cir. 1983); Davis v. Ohio Barge Line, Inc., 697 F.2d 549 (3rd Cir. 1983); Davis v. United Air Lines, Inc., 662 F.2d 120 (2d Cir. 1981), cert. denied, 456 U.S. 965 (1982); Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981), cert. denied, 459 U.S. 881 (1982); Simon v. St. Louis County, Missouri, 656 F.2d 316 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), cert. denied, 449 U.S. 889 (1980); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979). Plaintiff points to no statutory or regulatory language explicitly conferring the right to affirmative action on individuals. Instead, plaintiff relies on "congressional policy" to hire the handicapped. As the Tenth Circuit stated in Devargas, [sic] however, "such a policy statement cannot constitute a 'clearly established rule of law,' the violation of which would foreclose immunity." 844 F.2d at 725 n. 23.

Second, even if section 503 "clearly established" an individual's right to affirmative action in a particular case, this right was not clearly established at the time of plaintiff's applications for employment in 1981 and 1983. Plaintiff implicitly acknowledged the prior unavailability of a direct cause of action under section 503 when he sought to amend his complaint to add his claim under 42 U.S.C. § 1983 based on a violation of section 503, "in view of the recent United States Supreme Court decision in Wright v. Roanoke Redevelopment & Housing Authority," 479 U.S. 418 (1987). (Plaintiff's Memorandum of Points and Authorities in Response to Defendants' Motion for Partial Dismissal, to Strike Certain Allegations and for Partial Summary Judgment on the Proposed Second Amended Complaint, at 6). Since even plaintiff acknowledged by implication that his cause of action under 42 U.S.C. § 1983 for a violation of section 503 became viable, if at all, only after a 1987 decision by

the United States Supreme Court, it cannot be said that an individual's right to affirmative action in employment by a government contractor was "clearly established" as early as 1981 or 1983. See Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988) (the district court must examine the law as it was at the time of the defendants' actions).

Finally, the question is not whether plaintiff's rights under section 503 were clearly established, but instead, whether the "contours" of plaintiff's rights under section 503 were "sufficiently clear" that defendants would reasonably understand that their reliance on IMD 6102 in denying plaintiff's employment application violated those rights. See Anderson v. Creighton, 107 S.Ct. 3034, 3039 (1987). By emphasizing his asserted right to affirmative action in employment rather than defendants' application of IMD 6102 to plaintiff's request for employment, plaintiff misconstrues the nature of the inquiry relevant to qualified immunity. The proper inquiry examines the allegedly unlawful conduct, and asks whether that conduct was objectively reasonable, "as measured by reference to clearly established law." Harlow, 457 U.S. at 818. Plaintiff's approach would convert the rule of qualified immunity "into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of pleading." Anderson, 107 S.Ct. at 3039.

Once the inquiry is focused under the principles of Harlow and Anderson, the analysis follows that of the Tenth Circuit in DeVargas. Plaintiff does not dispute that defendants relied on IMD 6102's mandatory disqualification of one-eyed individuals in rejecting plaintiff's application to be a security inspector at LANL.[2] The

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[2] Plaintiff has not complied with D.N.M. R. 9(j)(2), which requires a memorandum in opposition to a motion for summary judgment to (continued...)

Tenth Circuit upheld defendants' interpretation of IMD 6102 in DeVargas. Furthermore, the Tenth Circuit held that IMD 6102 did not violate plaintiff's equal protection rights because the regulation was rationally related to legitimate governmental concerns of protecting classified information and nuclear material at LANL. 844 F.2d at 725. For the same reason, defendants' application of IMD 6102 did not violate plaintiff's rights (if any existed) under section 503, because the governmental concerns of protecting classified information and nuclear material at LANL constitute legitimate, nondiscriminatory reasons for refusing to hire one-eyed persons as security inspectors at LANL. Defendants' reliance on IMD 6102 in rejecting plaintiff's application as a security inspector did not violate plaintiff's "clearly established" rights under section 503 and defendants are entitled to qualified immunity as to this claim.

Plaintiff also argues that defendants are not entitled to qualified immunity as to his claim that the manner in which defendants applied IMD 6102 to him deprived him of this right to substantive due process. Plaintiff argues that defendants applied IMD 6102 in a manner which created a conclusive presumption that a class of persons (one-eyed individuals) could not perform job duties. As discussed above, however, the Tenth Circuit upheld defendants' application of IMD 6102 against plaintiff's equal protection challenge, finding that the regulation had a rational basis. Following the same reasoning, defendants' application of IMD 6102 did not violate plaintiff's substantive due process rights, because a substantive due process challenge is analyzed under the rational basis standard unless the statute or regulation

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[2] (...continued)
contain a concise statement of the material facts as to which the party contends a genuine issue exists. Under Local Rule 9(j)(2), all material facts set forth in the statement of the movant "shall be deemed admitted unless specifically controverted."

"trammels fundamental personal rights." Murphy v. Matheson, 742 F.2d 564, 575 (10th Cir. 1984). See also Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 -25 (1978); Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). As the Tenth Circuit pointed out, plaintiff has no fundamental constitutional right to government employment. DeVargas, 844 F.2d at 725. Because defendants' application of IMD 6102 was rationally related to legitimate governmental concerns of protecting classified information and nuclear material at LANL, defendants are also entitled to qualified immunity as to plaintiff's claim of a violation of his right to substantive due process.[3]

II. Discrimination on the Basis of National Origin

In plaintiff's Second Amended Complaint, plaintiff alleges that defendant Mason & Hanger engaged in a pattern and practice of discriminating against Hispanics. (Second Amended Complaint, ¶ 34). Plaintiff alleges that the discrimination included, but was not limited to, applying IMD 6102 to Hispanics in a manner different from the way it was applied to non-Hispanics. (Second Amended Complaint, ¶ 34). In support of the motion for summary judgment, Mason & Hanger presented evidence negating discrimination against Hispanics.

Summary judgment is an integral part of the Federal Rules of Civil Procedure, which are intended to "'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327

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[3] Even if defendants applied IMD 6102 in a manner which created a conclusive presumption, the rational basis test would apply. "An irrebutable [sic] presumption is not per se unconstitutional and does not demand an individualized hearing so long as it is rational." Burlington Northern Railroad Co. v. Department of Public Service Regulation, 763 F.2d 1106, 1113 (9th Cir. 1985) (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 22-24 (1976) and Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975)).

(1986)(quoting Fed. R. Civ. P. 1). A motion for summary judgment may be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Although the material submitted by the parties in support of and in opposition to the motion must be construed liberally in favor of the party opposing the motion, Harsha v. United States, 590 F.2d 884, 887 (10th Cir. 1979), the burden on the moving party may be discharged by demonstrating the absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324. In such a situation, the moving party is entitled to judgment as a matter of law, "because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 322.

In response to Mason & Hanger's evidence negating discrimination against Hispanics, plaintiff failed to present any evidence creating a genuine issue of material fact in opposition to the motion for summary judgment. Therefore, under the standard established in Celotex, Mason & Hanger is entitled to summary judgment on plaintiff's claim of discrimination on the basis of national origin.

III. Declaratory and Equitable Relief

In the Second Amended Complaint, plaintiff seeks judicial declarations that defendants' application of IMD 6102 to him was unconstitutional, that plaintiff was entitled to have his job application processed when it was submitted, and that he had the right to be examined by a physician and to have the determination of his medical qualification made by a physician. Plaintiff also seeks an order requiring Mason & Hanger to process his application and provide backpay for his lost wages from the date his application was rejected in 1981 until the date he is hired. As discussed above, both the Tenth Circuit and I have ruled that defendants' application of IMD

6102 to plaintiff was not unconstitutional. IMD 6102 legitimately prevented defendants from processing plaintiff's job application. Furthermore, the Tenth Circuit stated that "while IMD 6102 A 3 e appears to require a physician to make all medical qualification decisions, such a requirement makes sense only with regard to those medical disqualifications under IMD 6102 A 6 b which require the physician's judgment to determine their presence, or require a review of medical history or diagnosis." 844 F.2d at 725. This language suggests, quite clearly, that plaintiff was not entitled to be examined by a physician or to have had the determination of medical qualification made by a physician. It follows, then, that plaintiff is not entitled to an order requiring defendants to process his application, or to receive backpay for lost wages from the date of his application.

Plaintiff also alleges that the regulations which replaced IMD 6102 in 1984, codified at 40 C.F.R. § 1046 et seq., are currently being applied to plaintiff in an unconstitutional manner because defendant Pogna stated that the new regulations also prohibit Mason & Hanger from employing a one-eyed individual as a security inspector. (Second Amended Complaint, ¶ 62). Plaintiff seeks a declaration that defendants' application of 40 C.F.R. § 1046 et seq. to him is unconstitutional, and that plaintiff is entitled to a waiver of the medical qualification if plaintiff can demonstrate that he can perform all job duties safely and effectively. Plaintiff has not, however, reapplied for employment. Therefore, no revised regulations have as yet been applied to plaintiff, and his action for declaratory and equitable relief based on application of the regulations that superceded IMD 6102 does not present a justiciable controversy. A justiciable controversy "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227,

240-41 (1937). See also Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) ("the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality"). Under these standards, plaintiff's request for declaratory relief concerning the hypothetical application to him of the regulations codified at 40 C.F.R. § 1046 et seq. does not present a presently justiciable controversy.

Now, Therefore,

IT IS BY THE COURT ORDERED as follows:

(1) Defendants' motion for summary judgment is granted as to plaintiff's claim against Mason & Hanger of discrimination on the basis of national origin;

(2) Defendants' motion for summary judgment on the basis of qualified immunity is granted as to all remaining requests for damages in plaintiff's Second Amended Complaint;

(3) Defendants' motion for summary judgment as to plaintiff's claims for declaratory and equitable relief arising out of defendants' application of IMD 6102 is granted; and

(4) Defendants' motion to dismiss plaintiff's claims for declaratory and equitable relief arising out of defendants' application of the regulations which replaced IMD 6102 in 1984, codified at 40 C.F.R. § 1046 et seq., is granted.

s/s
District Judge

[Filed December 14, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CIV NO. 83-1674 JP

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; THE UNITED STATES DEPARTMENT OF ENERGY; JOHN S. HERRINGTON; GARY GRANERE; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Defendants.

JUDGMENT

Having entered a Memorandum Opinion and Order granting summary judgment in favor of defendant Mason & Hanger as to plaintiff's claim of discrimination on the basis of national origin, granting summary judgment in favor of all remaining defendants on the basis of qualified immunity as to plaintiff's remaining requests for damages in the Second Amended Complaint, granting summary judgment in favor of all remaining defendants as to plaintiff's claims for declaratory and equitable relief arising out of defendants' application of IMD 6102, and granting defendants' motion to dismiss plaintiff's claims for declaratory and equitable relief arising out of defendants' application of the regulations codified at 40 C.F.R. § 1046 et seq., I find judgment should be entered in favor of all defendants and against plaintiff as to all

of plaintiff's claims, and plaintiff's Second Amended Complaint should be dismissed.

Now, Therefore,

IT IS BY THE COURT ORDERED that judgment is hereby entered in favor of all defendants and against plaintiff as to all claims contained in plaintiff's Second Amended Complaint, and plaintiff's Second Amended Complaint is hereby dismissed with prejudice.

s/s
District Judge

[Filed December 14, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CIV No. 83-1674 JP

MASON & HANGER-SILAS
MASON CO., INC., et al.,

Defendants.

ORDER

This matter comes before the court on the plaintiff's Motion to Alter or Amend Judgment. I have decided to deny the motion after considering the briefs and related authorities. When considering applications for employment relating to national security, rational basis is the applicable standard of review. There is ample evidence in the record, some of which was discussed in the opinion of the Tenth Circuit Court of Appeals, supporting a rational basis for IMD 6102 on which defendants relied to deny plaintiff employment. DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988). Since IMD 6102 is a constitutional regulation, defendants had a right to rely on it without having to justify their reliance by proving the negative proposition that they were not trying unlawfully to discriminate against plaintiff by applying IMD 6102. Plaintiff came forward with no evidence that defendants applied IMD 6102 in an unconstitutional manner. In this situation no factual issue precluding summary judgment exists. Plaintiff's Motion to Alter or Amend Judgment and his memorandum filed in support of it do not raise new or differ-

ent legal arguments; all of plaintiff's arguments were given careful and due consideration before entry of the judgment on December 14, 1988 dismissing plaintiff's Second Amended Complaint.

IT IS THEREFORE ORDERED that plaintiff's Motion to Alter or Amend Judgment is denied.

s/s
Chief Judge

[Filed February 8, 1989]

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALFREDO DeVARGAS,	)	
Plaintiff-Appellant,	)	
v.	)	No. 89-2061
MASON & HANGER-SILAS MASON CO., INC.; T.R. HOOK, individually and in his official capacity; DON HARDWICK, individually and in his official capacity; JOHN DOES, One through Three, individually and in their official capacities; LOS ALAMOS NATIONAL LABORATORY; GARY GRANERE, Acting Area Manager-Department of Energy Los Alamos Area Office; REGENTS OF UNIVERSITY OF CALIFORNIA; DONALD KERR, Director, Los Alamos National Laboratory; THE UNITED STATES DEPARTMENT OF ENERGY; ROBERT POGNA, Employee Los Alamos National Laboratory; ED C. WALTERSCHEID, Employee Los Alamos National Laboratory; DONALD PAUL HODEL, Secretary of Department of Energy; and RICHARD ROES, One through Two, Individually and in their official capacities; and JOHN S. HERRINGTON,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CIV 83-1674 JP)

Richard Rosenstock (Steven Farber, of Santa Fe, New Mexico, and Philip Davis, Legal Director, New Mexico Civil Liberties Union, of Albuquerque, New Mexico, of counsel, with him on the briefs), of Chama, New Mexico, for the plaintiff-appellant.

Michael E. Robinson (Stuart E. Schiffer, Acting Assistant Attorney General; William L. Lutz, United States Attorney; and John F. Corden, Appellate Staff Civil Division, Department of Justice, Washington, D.C., with him on the brief), Appellate Staff Civil Division, Department of Justice, Washington, D.C., for the federal defendants-appellees.

Joseph E. Earnest (Laurie A. Vogel, of Cherpelis, Vogel & Salazar, of Albuquerque, New Mexico, with him on the brief), Montgomery & Andrews, P.A., of Santa Fe, New Mexico, for the defendants-appellees the University and Mason & Hanger.

Before **TACHA** and **McWILLIAMS**, Circuit Judges, and **CHRISTENSEN**, District Judge.*

TACHA, Circuit Judge.

This civil rights action arises from the refusal of Mason & Hanger-Silas Mason Company, Inc. ("Mason & Hanger") to consider Alfredo DeVargas for a position as a security inspector at the Los Alamos National Labora-

*The Honorable A. Sherman Christensen, District Judge, United States District Court for the District of Utah, sitting by designation.

tory ("LANL") in Los Alamos, New Mexico. The district court granted the defendants' motion for summary judgment, and DeVargas appeals. We affirm.

I.

DeVargas applied for a security inspector position with Mason & Hanger in 1981 and 1983. Pursuant to a contract with the Regents of the University of California ("Regents"), Mason & Hanger supplies security inspectors for LANL. The Regents operate LANL for the Department of Energy ("DOE"), which conducts nuclear weapon and energy research at LANL. The three individual LANL defendants, Donald Kerr, Robert Pogna, and Edward C. Walterscheid ("individual LANL defendants") are employees of the University of California ("University"). Gary Granere, the Acting Area Manager for the DOE's LANL office, is a federal employee.

In 1981, Mason & Hanger and its employees, T.R. Hook and Don Hardwick ("individual Mason & Hanger defendants"), refused to process DeVargas's employment application, relying on a then-applicable DOE regulation, Interim Management Directive No. 6102 § A.6.b.(8) Appendix IV (IMD 6102),[1] which provided that "[a] one-eyed individual shall be medically disqualified for security inspector duties." DeVargas has vision in only one eye. When DeVargas reapplied in 1983, the Mason & Hanger defendants consulted with the individual LANL defendants, who agreed that IMD 6102 constituted a mandatory disqualification of one-eyed persons.

DeVargas filed suit, alleging in his first amended complaint that the defendants violated sections 503 and

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[1] In November 1984, IMD 6102 was superseded by new regulations, which are codified at 10 C.F.R. § 1046 (1989). DeVargas has not reapplied for employment following the promulgation of these new regulations. For this reason the district court ruled that DeVargas lacks article III standing to argue that he is entitled to be hired by the defendants. DeVargas does not appeal this ruling.

504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794-95, and that the defendants unlawfully discriminated against him on the basis of his ancestry and handicap, in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the fifth and fourteenth amendments, U.S. Const. amends. V, XIV. DeVargas also alleged that the DOE promulgated IMD 6102 in violation of section 504 and the fifth amendment.

On April 9, 1986, the district court granted the defendants' motion for summary judgment on the section 504 and fifth amendment claims. The court dismissed all claims against the Regents and LANL based on their eleventh amendment immunity.[2] The court did not extend eleventh amendment immunity to Kerr, Pogna, and Walterscheid, the LANL defendants, because they were sued only in their individual capacity [sic]. The DOE, Secretary of Energy Donald Paul Hodel, and Gary Granere moved to dismiss all claims for monetary damages based on the defense of sovereign immunity. The court permitted only DeVargas's claims for injunctive, nonmonetary relief to continue against these defendants in their official capacities.[3] See 5 U.S.C. § 702. The court did not dismiss the claims for monetary damages against Hodel and Granere in their individual capacities.

The defendants also raised the defense of qualified immunity against DeVargas's claim that they unlawfully

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[2] Congress subsequently abrogated any Eleventh Amendment defenses to a section 504 claim that is based on conduct occurring after October 21, 1986. See 42 U.S.C. § 2000d-7.

[3] We note that the district court's ruling was not entirely correct. While the district court barred all claims for monetary relief, the bar on recovery of "money damages" contained in 5 U.S.C. section 702 does not include equitable backpay, which is a form of equitable relief, not monetary damages. See Bowen v. Massachusetts, ___ U.S. ___, ___, 108 S. Ct. 2722, 2731-41 (1988). DeVargas, however, does not appeal the district court's ruling on this issue.

discriminated against him on the basis of his ancestry and handicap in violation of 42 U.S.C. section 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In October, 1986, the district court ruled that the individual LANL and DOE defendants enjoyed qualified immunity from DeVargas's claims for damages against them in their individual capacities. The court rejected the request of the Mason & Hanger defendants for qualified immunity. Pursuant to an interlocutory appeal, this court reversed, ruling that Mason & Hanger and the individual Mason & Hanger defendants also possess qualified immunity in spite of Mason & Hanger's status as a private corporation. See DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988) (DeVargas I). We also held that the conduct of the Mason & Hanger defendants did not violate clearly established law under either IMD 6102 or the equal protection clause of the fourteenth amendment.[4] Id. at 724-25. Following remand, the district court permitted DeVargas to file a second amended complaint. The court entered summary judgment against DeVargas's remaining claims on December 14, 1988.

DeVargas limits his appeal to the following arguments: (1) the defendants violated section 504; (2) the trial court erred by refusing to permit further discovery prior to ruling on the section 504 claim; (3) the defendants' application of IMD 6102 deprived DeVargas of his clearly established right to substantive due process of law under the fifth and fourteenth amendments; and (4) the defendants violated 42 U.S.C. section 1983.

II.

We first determine whether the Mason & Hanger

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[4] None of the defendants in this case argue on appeal that they are entitled to a qualified immunity defense from the section 504 claim.

defendants violated section 504, which prohibits discrimination against handicapped persons by "any program or activity receiving federal financial assistance." 29 U.S.C. § 794. The district court granted summary judgment in favor of Mason & Hanger, concluding that liability could not lie against the Mason & Hanger defendants because Mason & Hanger's operations were not programs or activities that received federal financial assistance. DeVargas insists that the available evidence indicates that Mason & Hanger received federal financial assistance.

In our review of grants of summary judgment, we must reverse if there is a genuine issue concerning a material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). We review all legal questions de novo. See Carey v. United States Postal Serv., 812 F.2d 621, 623 (10th Cir. 1987).

The term "financial assistance" is not defined in the Rehabilitation Act. We apply the ordinary meaning of the term and conclude that a [sic] entity receives financial assistance when it receives a subsidy. See Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1208-09 (9th Cir. 1984), cert. dismissed, 471 U.S. 1062 (1985).

In determining whether a party has obtained federal financial assistance under section 504, we decline to scrutinize the fair market value of every transaction as if we were article III accountants. See id. at 1210 (outlining practical problems of a test based solely on fair market value). We do not read section 504 to declare that a contractor receives federal financial assistance whenever the contractor negotiates a contract with favorable terms that compensate the contractor at a rate above the fair market value. We agree with the Jacobson court's conclusion that "in determining which programs are subject to the civil rights laws, courts should focus not on market value but on the intention of the government" to give a subsidy, as opposed to government intent to provide compensation. Id. at 1210 (emphasis

added). We conclude that to determine the applicability of section 504, we must determine whether the government intended to give Mason & Hanger a subsidy.

In this case there is little doubt that Congress did not intend to subsidize Mason & Hanger's operations. Prior to the decision to replace the former government guards with private employees, the DOE conducted a study which concluded that the government would save approximately $3.5 million by contracting out guard services. Moreover, the government awarded the contract to Mason & Hanger only after a competitive bidding process. Both of these factors lead us to conclude that there was no governmental intent to give Mason & Hanger a subsidy.

Our conclusion is consistent with departmental regulations. The Department of Energy's implementing regulations state that the provisions of the Rehabilitation Act do not apply to government procurement contracts, see 10 C.F.R. § 1040.2(b)(3) (1985), which are defined as, inter alia, contracts to purchase services from nonfederal sources, see 41 C.F.R. § 1-1.209 (1984) (former provision). Under this regulation, the purchase from Mason & Hanger of nonpersonal services is a procurement contract outside the reach of the Rehabilitation Act.[5] We hold that the district court correctly granted the motion for summary judgment by the Mason & Hanger defendants on the grounds that the security company and its employees do not fall within the ambit of section 504 of the Rehabilitation Act.

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[5] The DOE regulation is in accord with those of other executive agencies. For example, the regulations of the Department of Health and Human Services state that government procurement contracts do not convey financial assistance, while transfers or leases of government property at less than fair market value or for reduced consideration are forms of financial assistance. See 45 C.F.R. § 84.3(h)(1989). See also 28 C.F.R. § 41.3(e)(1989) (Department of Justice regulation).

III.

We next determine whether the district court correctly granted the individual LANL defendants' request for summary judgment on the section 504 claim.[6] DeVargas argues that the individual LANL defendants are liable under section 504 because LANL, an alleged recipient of federal financial assistance, required Mason & Hanger to administer the allegedly discriminatory policy. The contract between the Regents and Mason & Hanger expressly required that Mason & Hanger abide by any applicable federal regulations relating to the security of LANL. One of the applicable regulations was IMD 6102, and DeVargas states that in 1983 the individual LANL defendants informed Mason & Hanger that IMD 6102 mandated that Mason & Hanger not hire DeVargas. DeVargas insists that the individual LANL defendants cannot escape liability for discrimination when they required Mason & Hanger to administer the allegedly discriminatory policy.

The district court rejected DeVargas's argument on the grounds that section 504's ban on "discrimination under any program or activity receiving Federal financial assistance," 29 U.S.C. § 794, was program-specific. Thus, the district court ruled that even if LANL did receive federal financial assistance, the actions of the LANL defendants did not violate section 504 because the particular program that allegedly discriminated against DeVargas was Mason & Hanger, not LANL.

At the time that the district court issued its ruling on DeVargas's 504 claim, the court correctly relied on Con-

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[6] At the outset we note that the individual LANL defendants are now before us only in their individual, as opposed to their official, capacities. Therefore DeVargas cannot obtain equitable backpay from the LANL defendants because government officials acting in their individual capacities cannot perform the official function of awarding backpay. See Lenea v. Lane, 882 F.2d 1171, 1178 (7th Cir. 1989).

solidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), which held that section 504's prohibition on discrimination by a "program or activity receiving Federal financial assistance" extended only to the specific program or activity receiving the federal funds. Id. at 635-36. The Consolidated Rail decision relied on Grove City College v. Bell, 465 U.S. 555 (1984), which held that Title IX's ban on sex discrimination in any "program or activity receiving Federal financial assistance" prohibited discrimination only in the particular program or activity specifically supported by federal funds. Id. at 570-76. On the basis of these decisions, the district court correctly held that section 504 was program-specific. See Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159, 1162-63 (10th Cir. 1986) (section 504 contains a program specificity requirement); Gallagher v. Pontiac School Dist., 807 F.2d 75, 79 -81 (6th Cir. 1986) (holding that under program-specific requirement of section 504, plaintiff must show that he was denied the benefits of a scholastic program receiving federal financial assistance and not just that he was denied the benefits of a program operated by a school system receiving federal financial assistance).

After the district court issued its opinion, however, Congress enacted the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) ("Restoration Act" or "Act"). Congress premised the Restoration Act upon its findings that "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964; and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." Restoration Act § 2, 102 Stat. at 28. The Senate report more bluntly states that the purpose of the Restoration

Act is "to overturn the Supreme Court's 1984 decision in Grove City College v. Bell, 465 U.S. 555 . . . ." S. Rep. No. 64, 100th Cong., 2d Sess. 1, reprinted in 1988 U.S. Code Cong. & Admin. News 3-4.

Section four of the Restoration Act added section 504(b) to the Rehabilitation Act, which provides in pertinent part: "For purposes of this section, the term 'program or activity' means all of the operations of -- . . . (2)(A) a college, university or other postsecondary institution . . . ." Restoration Act § 4, 102 Stat. at 29 (emphasis added) (codified at 29 U.S.C. § 794(b)). This language overturns the program-specific interpretation of "program or activity" developed in Grove City and Consolidated Rail. In the context of a university, the term "program or activity" now refers to all of the operations of the university.

DeVargas argues that the passage of the Restoration Act invalidates the district court's reliance on the program-specific interpretation of section 504 that existed prior to enactment of the Restoration Act. DeVargas renews his argument that the individual LANL defendants cannot escape liability under section 504 of the Rehabilitation Act when they required Mason & Hanger to perpetrate discrimination.

A.

It is clear that the individual LANL defendants are not liable under section 504 as interpreted by the Supreme Court in Consolidated Rail prior to the Restoration Act. Therefore, we must decide whether the Restoration Act retroactively applies to this case.

To determine whether the Restoration Act applies retroactively, we look to congressional intent. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, ___ U.S. ___, ___, 110 S. Ct. 1570, 1577 (1990) ("where the congressional intent is clear, it governs"). Our examination of the language and legislative history of the Restor-

ation Act reveals an absence of clear congressional intent that courts retroactively apply the Act's amendments.

We look first to the language of the Restoration Act. See Kaiser, 110 S. Ct. at 1575. The Act states:

> The Congress finds that --
>
> (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of . . . section 504 of the Rehabilitation Act of 1973 . . . ; and
>
> (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

See Restoration Act § 2, 102 Stat. at 28 (1988) (emphasis added). The Senate report accompanying the proposed legislation echoes these sentiments:

> II. Purpose
>
> S. 557 was introduced on February 19, 1987, to overturn the Supreme Court's 1984 decision in Grove City College v. Bell, 465 U.S. 555, and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs.
>
> The Grove City ruling severely narrows the application of coverage of Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation

> Act of 1973, and the Age Discrimination Act of 1975.
>
> The purpose of the Civil Rights Restoration Act of 1987 is to reaffirm pre-Grove City College judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the antidiscrimination provisions of these civil rights statutes.

S. Rep. No. 64, 100th Cong., 2d Sess. 2, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 3-4 (footnote omitted; emphasis added). The Senate report also states that: "other cases that were in the formal enforcement stage are still in jeopardy. These are cases where discrimination has been found, voluntary compliance was refused, and recipients are using the Supreme Court's decision [in Grove City College] as a defense against federal enforcement." S. Rep. No. 64, 100th Cong., 2d Sess. 11, reprinted in 1988 U.S. Code Cong. & Admin. News 13.

Considering both the language of the Restoration Act and the Senate report, we find a congressional purpose to overturn Grove City College, but no clear expression of intent regarding retroactive application of the Act's amendments. Unlike other congressional amendments to existing laws enacted by Congress in response to Supreme Court decisions, the Restoration Act contains no statutory language clearly stating that the Act's amendments shall or shall not apply to pending litigation.[7] We also find that the expressed congressional in-

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[7] Compare Restoration Act with Longshore and Harbor Workers' Compensation Act Amendments of 1984 ("LHWCA"), Pub. L. No. 98-426, §§ 5, 28(a), 28(c), 98 Stat. 1639, 1641, 1655 (§ 5 codified as amended at 33 U.S.C. § 905; §§ 28(a), (c) discussed in legislative history notes to 33 U.S.C. § 901) and Handicapped Children's Protection

(continued...)

tent in the Senate report to "restore" section 504 to its pre-Grove City College interpretation reflects unambiguously only Congress's purpose to reverse the Supreme Court's program-specific reading of federal prohibitions on discrimination by programs or activities receiving federal financial assistance. Because we must find clear congressional intent to invoke retroactivity, we cannot read "restore" to mean "retroactively restore," particularly where the effect of such a reading would be to impose substantive liability for actions committed in reliance on Grove City College and its progeny prior to the passage of the Restoration Act in 1988. Contra Leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414, 1416-18 (E.D.N.Y. 1988) (Restoration Act applies retroactively), aff'd, 869 F.2d 130, 131 (2d Cir. 1989) (per curiam); see also Bonner v. Arizona Dep't of Corrections, 714 F. Supp. 420, 422-23 (D. Ariz. 1989) (adopting reasoning of Leake). Nor do we find that the Senate report's concern about potential jeopardy to formal enforcement actions due to the Grove City College decision necessarily re-

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[7] (...continued)
Act of 1986 ("HCPA"), Pub. L. No. 99-372, §§ 2, 5, 100 Stat. 796, 796-97, 798 (§ 2 codified as amended at 20 U.S.C. § 1415(e)(4); § 5 discussed in legislative history notes to 20 U.S.C. § 1415). See also H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 24, reprinted in 1984 U.S. Code Cong. & Admin. News 2774 (§ 5 amendment of LHWCA disapproves Washington Metro. Area Transit Auth. v. Johnson, 467 U.S. 925 (1984), and provides a special effective date so amendment applies to pending cases, thus WMATA will not have precedential effect); Louviere v. Marathon Oil Co., 755 F.2d 428, 430 (5th Cir. 1985) (Congress provided that LHWCA amendment to 33 U.S.C. § 905 shall apply to pending cases); S. Rep. No. 112, 99th Cong., 2d Sess. 2-3, reprinted in 1986 U.S. Code Cong. & Admin. News 1799-1800 (in response to Smith v. Robinson, 468 U.S. 2 (1984), § 2 of the HCPA clarifies Congress's intent that prevailing parents in Education of the Handicapped Act ("EHA") cases be awarded reasonable attorneys' fees, and HCPA also authorizes courts retroactively to award attorneys' fees for civil court actions to parents who prevailed in EHA cases pending or brought after the date of the Smith v. Robinson decision.

quires retroactive application because there is no indication that the violations were not continuing. In any event, an ambiguous statement in the Senate report on the need for action does not amount to the clear intent required to invoke retroactivity. We therefore hold that the statutory language and authoritative legislative history of the Restoration Act do not evidence a clear congressional intent that courts apply retroactively the Act's amendments to section 504 of the Rehabilitation Act.

We recognize that our holding conflicts with the decisions of the Second Circuit in Leake v. Long Island Jewish Medical Center, 869 F.2d 130 (2d Cir. 1989) (per curiam), and the Fifth Circuit in Ayers v. Allain, 893 F.2d 732, reh'g en banc granted, 898 F.2d 1014 (5th Cir. 1990). After scrutinizing these opinions, however, we find their analysis unpersuasive.

The Second Circuit's opinion in Leake affirmed per curiam the reasoning of the district court in leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414 (E.D.N.Y. 1988). See Leake, 869 F.2d at 131. We therefore focus on the district court's opinion in Leake.

Plaintiff Robert Leake sued his employer under section 504 of the Rehabilitation Act. The issue as framed by the district court was "whether the Restoration Act should be applied retroactively to enable plaintiff, who initiated his suit before its passage, to sue." Leake, 695 F. Supp. at 1416.

The Leake district court began its analysis by specifically finding that "the Restoration Act itself does not indicate any intent of Congress for retroactive application." Id. However, the court found some indication of congressional intent that courts were to retroactively apply the Restoration Act in the floor statement of the bill's sponsor, Congressman Edwards, who said "[t]his bill applies to all pending cases . . . ," 134 Cong. Rec. H583

(daily ed. Mar. 2, 1988), and the floor statements of Senators Packwood[8] and Stafford.[9] Leake, 695 F. Supp. at 1416-17. The Leake court then went back to the language of the Restoration Act, which it had previously found to be ambiguous on the retroactivity issue, and focused on the terms "restore" and "clarify." Analogizing to the Second Circuit's analysis of the congressional intent behind these words in Mrs. W. V. Tirozzi, 832 F.2d 748, 755 (2d Cir. 1987) (examining the Handicapped Children's Protection Act of 1986 ("HCPA")), the Leake district court concluded that Congress must have intended the Restoration Act to apply retroactively.

We are not persuaded by the Leake district court's analysis for two reasons. First, Congress's intended meaning and use of the terms "restore" and "clarify" in the HCPA is rooted in the specific context of the HCPA's statutory language and legislative history. We therefore reject the motion that congressional intent for the Restoration Act may be discerned by analogy to a different statute enacted by a different Congress.

Second, where the statutory language of the Restoration Act and the Senate report simply do not address retroactive application of the Act, we refuse to resolve this important issue solely on the basis of the floor statement of Congressman Edwards that the Act was to apply to pending cases. See Brock v. Pierce County, 476 U.S. 253, 263 (1986) ("statements by individual legislators

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[8] During the floor debate to override President Reagan's veto of the Restoration Act, Senator Packwood stated: "all we have done is change the law back to what we thought it was. We have not expanded it beyond what we thought it was." 134 Cong. Rec. S2735 (daily ed. Mar. 22, 1988).

[9] Senator Stafford, an original sponsor of section 504 of the Rehabilitation Act, stated: "[the] institution-wide definition [was] originally intended by legislators." 134 Cong. Rec. S2739 (daily ed. Mar. 22, 1988).

should not be given controlling effect" for purposes of discerning congressional intent); Weinberger v. Rossi, 456 U.S. 25, 35 n.15 ("contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history"). As for the floor statements of Senators Packwood and Stafford, see supra notes 8-9, we find that these remarks do not directly address the retroactivity issue, much less dispose of it. Furthermore, the Leake district court's reliance on Regents of the University of California v. Public Employment Relations Board, ___ U.S. ___, ___, 108 S. Ct. 1404, 1409 (1988), for the proposition that "[c]ongressional intent may be inferred from the statement of a sponsor on the floor," Leake, 695 F. Supp. at 1417, is misplaced, for this rule of statutory construction only applies where the statement is consistent with the statutory language and other legislative history. See Brock, 476 U.S. at 263; see also Regan v. Wald, 468 U.S. 222, 236-38 (1984) (statements of subcommittee hearings, mark up sessions, floor debates, and House and Senate reports cannot overcome plain meaning of statute). In Regents of the University of California, the Court primarily "rel[ied] on the normal meaning of the [statutory] language chosen by Congress," 108 S. Ct. at 1409, and then went on to discuss how this interpretation was consistent with the legislative history, including the statement of a floor sponsor, see id. at 1409-10. In contrast, the floor statement of Congressman Edwards speaks to an issue, retroactive application, which the Leake district court had already determined was not addressed in the statutory language of the Restoration Act. We refuse to rely on such a slender thread to fashion out of whole cloth a cloak of retroactivity for the Restoration Act.

We next turn to the Fifth Circuit's opinion in Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990). In Ayers the plaintiffs alleged that the policies and practices of various Mississippi state officials perpetuated a racially based dual system of public higher education in violation

of the equal protection clause of the fourteenth amendment, U.S. Const. amend. XIV, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The district court ruled for the defendants on the issue of liability and dismissed the plaintiffs' case. The issue before the Fifth Circuit regarding the plaintiffs' Title VI claim was "whether Grove City controls the outcome of this case or whether the [Restoration Act] legislation applies retroactively." Ayers, 893 F.2d at 754. The Fifth Circuit resolved the issue in favor of retroactivity:

> Retroactive application of a statute is appropriate when Congress enacts the statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture. This rule flows from two of the Supreme Court's canons of statutory construction. First, subsequent legislation declaring the intent of an earlier statute is entitled to great weight . . . . Second, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.

Id. at 754-75 (footnotes omitted).

We disagree with the Ayers ruling because it resolves the retroactivity issue based on congressional intent implied from the circumstances motivating Congress to act rather than from the directly relevant statements of Congress in the statute's language or authoritative legislative history. The standard of "clear congressional intent" for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation. We simply cannot derive a "clear congressional intent" solely from the circumstance that Congress acted to amend existing law in response to a Supreme

Court opinion, particularly where Congress acting under the same motivating circumstances has expressly and specifically stated that its newly enacted amendment was to apply to pending cases. See supra note 7.

Moreover, the logic behind the Fifth Circuit's rule is inconsistent with the constitutional division of authority between Congress and the Supreme Court. Under our view of the separation of powers, it is Congress's prerogative to make the law by enacting legislation. It is, however, "emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); see also The Federalist No. 78, at 116 (A. Hamilton) (H. Commager ed. 1949) ("The interpretation of the laws is the proper and peculiar province of the courts.") (emphasis added). Once the Supreme Court has interpreted a statute, that construction becomes a part of the statute, and the Court's interpretation applies retroactively to pending cases. See infra note 11. This rule of retroactive application of judicial decisions flows directly from the court's function of interpretating [sic] law. Stated simply, what the Court interprets the law as saying is what the law says. Congress, of course, has the power to change the law and may amend the law to comport with either its own or the (perceived) intentions of the Congress which originally enacted the law. These congressional amendments, however, cannot undo the Supreme Court's authoritative construction of the original statute. When a subsequent Congress amends the law in response to the Supreme Court's interpretation, it does not revive the original enacting Congress's interpretation of the statute which existed before the Supreme Court's interpretation. Rather, the result of a subsequent Congress's "restoration" efforts is newly created law. As with any newly enacted legislation, Congress must state clearly its intentions with regard to retroactivity. We therefore disagree with the Fifth Circuit's approach to the extent that it creates a special rule for the situation where Congress

rejects a judicial interpretation; this approach implicitly treats Congress as a court of revision rather than as the law-making branch of the federal government.

There is nothing jurisprudentially unique about the situation where congress amends a statute in response to the Supreme Court's interpretation. Regardless of whether Congress enacts a new law or amends an existing one, our analysis remains the same. We must examine whether Congress clearly and expressly intended the new law to apply retroactively, as shown by statutory language or authoritative legislative history. We will not imply such an intent where Congress chose to remain silent. For us to "imply" intent derogates from Congress's power to determine the retroactive effect of its own laws. Therefore, in the absence of such clear congressional intent, we apply the appropriate Supreme Court precedent setting forth presumptions governing the retroactive application of newly enacted legislation.

C.

Having determined that the language and legislative history of the Restoration Act do not evidence a clear congressional intent for or against its retroactive application, we turn to Supreme Court precedent for guidance. Our research reveals two lines of authority setting forth conflicting presumptions regarding the retroactive application of a newly enacted federal statute where congressional intent is unclear. The court's most recent articulations of these opposing presumptions are found in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), and Bowen v. Georgetown University Hospital, ___ U.S. ___, 109 S. Ct. 468 (1988).

Bradley was the product of a protracted class action suit brought to desegregate the Richmond, Virginia school system. The court in Bradley addressed whether an appellate court should retroactively apply an attorneys' fees statute that came into effect during the pen-

dency of the appeal. The district court had awarded attorneys' fees to the plaintiffs based on the court's general equitable powers. After the initial submission of the case to the Fourth Circuit Court of Appeals, but prior to that court's decision, Congress enacted section 718 of Title VII of the Emergency School Aid Act, 20 U.S.C. § 1617, which granted federal courts the authority to award reasonable attorneys' fees in a school desegregation case. The Fourth Circuit held that section 718 could not be applied retroactively to sustain the attorneys' fees award. The Supreme Court reversed, holding that "a court is to apply the law in effect at the time it renders its decision . . . ." Bradley, 416 U.S. at 711.[10]

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[10] To soften the potentially harsh impact of Bradley's presumption favoring the retroactive application of federal statutes, the Court recognized two exceptions to the presumption that appellate courts are to apply the law in effect at the time of decision. First, the presumption does not apply where there is clear congressional intent to the contrary. Bradley, 416 U.S. at 711. Second, the presumption does not govern where retroactive application of the new law would result in "manifest injustice" to one of the parties. Id.; see also Kaiser, 110 S. Ct. at 1577.

Bradley held that courts are to determine whether manifest injustice exists by examining "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Bradley, 416 U.S. at 717. The meaning of the Bradley "manifest injustice" test has been obfuscated by subsequent Supreme Court opinions, however. For example, the Bradley Court originally stated that the Bradley presumption would not be applied to "deprive a person of a right that had matured or become unconditional." Id. at 720. However, in Bennett v. New Jersey, 470 U.S. 632 (1985), the Court stated that this limitation on Bradley "comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Id. at 639. Thus, the Bennett court either declined to enter the Bradley analysis at all or else possibly revised prong (b) of the Bradley manifest injustice test from what appeared to be "vested rights" to any "substantive right or liability," see Kaiser, 110 S. Ct. at 1585 (Scalia, J., concurring). But see id. at 1593 (White, J., dissenting) (plaintiff did not have a "vested" right to postjudgment

(continued...)

The Bradley court read Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969), as standing for the proposition that "even where the inter[vening] law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." Bradley, 416 U.S. at 715. Bradley expressly rejected the contention that "a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." Id.

In direct conflict with the Bradley presumption is another line of Supreme Court precedent, the most recent illustration of which is Bowen v. Georgetown University Hospital, ___ U.S. ___, 109 S. Ct. 468 (1988). Bowen examined the authority of the Secretary of Health and Human Services ("Secretary") to promulgate retroactive regulations setting limits on the level of reimbursable medicare costs. In 1981, the Secretary issued a new cost-limit schedule that contained a change in the method for calculating the "wage index," which reflects the salary levels for hospital employees in different parts of the country. The new calculation excluded federal hospital wages from the wage index. Various hospitals sued to enjoin enforcement of the 1981 cost-limit schedule. The district court struck down the 1981 wage-index on the ground that the Secretary had failed to provide notice and an opportunity for comment as required by the Administrative Procedure Act, 5 U.S.C. § 551. In 1984, ten months after the district court's ruling, the Secretary sought public comment on a proposal to reissue the 1981 wage index rule, retroactive to July 1, 1981. After considering the comments submitted, the Secretary

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[10] (...continued)
interest under the Bradley "manifest injustice" test). Given these ambiguous signals from the Court, we are inclined to agree with Justice Scalia's criticism that "manifest injustice" means "almost anything" and is in fact nothing more than "a surrogate for policy preferences." Kaiser, 110 S. Ct. at 1587 (Scalia, J., concurring).

reissued the 1981 cost-limit schedule and required a group of seven hospitals who had benefited from the invalidation of the 1981 schedule to return over $2 million in reimbursement payments. See Bowen, 109 S. Ct. at 471.

The Bowen Court struck down the retroactive cost-limit rules on the ground that Congress had not authorized the Secretary in the Medicare Act to issue retroactive rules. In so doing, the Supreme Court reaffirmed the rule that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Id.

The Supreme Court recently acknowledged that an "apparent tension" exists between the Bradley and Bowen lines of precedent in Kaiser Aluminum & Chemical Corp. v. Bonjorno, ___ U.S. ___, ___, 110 S. Ct. 1570, 1577 (1990). The majority found that it did not need to reconcile the apparent conflict, however, "because under either view, where the congressional intent is clear, it governs." Id. The Kaiser court went on to hold that the plain language of the statute at issue evidenced clear congressional intent against retroactivity. Id. at 1577-78.

Having found in Part III.A. of this opinion that the language and legislative history of the Restoration Act do not evidence a clear congressional intent for or against its retroactive application, we have struggled in vain to reconcile the Bradley and Bowen lines of precedent. We have concluded, however, that under the circumstances of this case the Bradley and Bowen line of cases are in "irreconcilable contradiction," see Kaiser, 110 S. Ct. at 1579 (Scalia, J., concurring). Where congressional intent on retroactivity is ambiguous, we simply cannot harmonize the presumption that a new statute should be applied retroactively even if it "does not explicitedly [sic] recite that it is to be applied to pending cases," Bradley, 416 U.S. at 715, with the contrary pre-

sumption that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result," Bowen, 109 S. Ct. at 471. Application of either principle directly countermands the other in the situation where, as before us, congressional intent on retroactivity is unclear.

We recognize the possibility that even where congressional intent on retroactivity is unclear, application of either the Bradley or Bowen presumption may result in the same outcome by virtue of Bradley's "manifest injustice" exception. See supra note 10. However, we agree with Justice Scalia's observation in Kaiser that "[i]n the rules of construction they announce, if not in the results they produce, these two lines of cases are . . . in irreconcilable contradiction." Kaiser, 110 S. Ct. at 1579 (Scalia, J., concurring). In our view, the appropriate legal analysis is to decide first whether the Bradley presumption applies before going on to analyze whether the case nevertheless falls within the "manifest injustice" exception. See Bradley, 416 U.S. at 711-721 (deciding first that presumption governs, then examining whether "manifest injustice" exception applies). Thus, we are faced squarely with the issue recognized but left unresolved in Kaiser; namely, when congressional intent on retroactivity is unclear, which presumption -- Bradley or Bowen -- is to govern?

Forced to elect between these contradictory presumptions, we choose Bowen. We find that the Bowen line of cases is well-entrenched in the history of the Supreme Court jurisprudence, whereas Bradley is largely unsupported by its cited authorities.

We are strongly persuaded by Justice Scalia's observation in his concurring opinion in Kaiser that the presumption of prospective application of statutes is supported by over 150 years of Supreme Court precedent, stretching from the early part of the nineteenth century to the middle of this century. See Kaiser, 110 S. Ct. at

1579-81 (Scalia, J., concurring) (citing in part: United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) ("Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied"); Miller v. United States, 294 U.S. 435, 439 (1935)("[A] statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears")).

In contrast with this long line of precedent, with the exception of Thorpe, 393 U.S. 268, none of the cases cited by Bradley stand for the proposition that statutes are presumed to apply retroactively. Instead, the cited decisions involve either: the retroactive application of judicial decisions,[11] see Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 542 (1941); Patterson v. Alabama, 294 U.S. 600, 607 (1935); Sioux County v. National Surety Co., 276 U.S. 238, 240 (1928); Dorchy v. Kansas, 264 U.S. 286, 291 (1924); Moores v. National Bank, 104 U.S. 625, 629 (1882), the retroactive application of statutes that contain express language requiring this result, see Dickinson Industrial Site, Inc. v. Cowan, 309 U.S. 382, 383 (1940); Carpenter v. Wabash Ry. Co., 309 U.S. 23, 27 (1940); Stephens v. Cherokee Nation, 174 U.S. 445, 477-78 (1899); Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 162 (1865), a statute that must necessarily be applied prospectively because the dispute involves either injunctive relief, see Dinsmore v. Southern Express Co.,

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[11] That judicial decisions operate retroactively lends no support to the argument that there is a presumption for retroactive operation of statutes. See United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"). Judicial decisions operate retroactively because we generally regard them as an expression of pre-existing law. See Kaiser, 110 S. Ct. at 1582 (Scalia, J., concurring).

183 U.S. 115, 120 (1901), or a permit for future action, see Ziffrin v. United States, 318 U.S. 73, 78 (1943), a case remanding to a state court in order for the state court to determine the effect of a newly enacted state statute, see Missouri ex rel. Wabash Ry. Co. v. Public Service Comm'n, 273 U.S. 126, 131 (1927), a case involving the general rule that criminal penalties cannot be enforced following the repeal of the statute that proscribed the conduct giving rise to the penalty, see United States v. Chambers, 291 U.S. 217, 222-23 (1934), and a case staying further proceedings where the outbreak of World War I, made it impossible for the citizen of a belligerent nation to continue to represent himself, see Watts, Watts & Co. v. Unione Austriaca di Navigazione, 248 U.S. 9, 22-23 (1918). See also Kaiser, 110 S. Ct. at 1583-84 (Scalia, J., concurring) (discussing above cases).

The rule that, absent clear congressional intent to the contrary, statutes are presumed to apply prospectively was uncontroverted until the Supreme Court decided Thorpe in 1969. See Kaiser, 110 S. Ct. at 1581 (Scalia, J., concurring). Thorpe involved a federal regulation requiring landlords to inform tenants of the reasons for eviction. The Thorpe court retroactively applied the regulation and invalidated an eviction order issued eighteen months prior to the promulgation of the regulation. In contrast to the longstanding presumption of prospective application of statutes, Thorpe held that "[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." Thorpe, 393 U.S. at 281. In support of this rule, Thorpe cited five cases, four of which, Vandenbark, Carpenter, Chambers, and Ziffrin, we have already examined and found unsupportive. The fifth case Thorpe cited was United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), which involved the question of whether the United States could condemn a captured French vessel. After the lower court ruled in the affirmative, and be-

fore the Supreme Court heard the case, the United States entered into a convention with France providing for the return of French "property captured and not yet definitively condemned . . . ." Id. at 103 (emphasis in original). The Court discussed the lower court's ruling and concluded that it did not constitute a "definitive" condemnation of the vessel within the meaning of the treaty:

> The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty, is not deemed a correct argument . . . . The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual condition of the property, and to direct a restoration of that which is still in controversy between the parties . . . . In this case the sentence of condemnation was appealed from. It might have been reversed, and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

Id. at 108-09. On this basis, the Court stated: "if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . . ." Id. at 110. The Court's reference to a law which "intervenes and positively changes the rule which governs" must be taken in context. The terms of law before the [sic?] The

Schooner Peggy Court required retroactive application to "all property captured and not yet definitively condemned" by the courts. Thus, under the actual facts of The Schooner Peggy, a change in the law while a case was pending was applied by the Supreme Court where by its terms, the law was to be applied retroactively to pending cases, a position entirely in keeping with the Bowen line of cases. Thorpe marked the first departure from this long line of precendent [sic] when it broadened the rule set forth in The Schooner Peggy: "Thorpe thus stands for the proposition that even where the inter [vening] law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." Bradley, 416 U.S. at 715.

We conclude that Thorpe rested its holding on cases that either offer no support for that proposition or lend support to the opposite proposition. Faced with a choice between the long-standing and authoritative Bowen line of precedent and Bradley, which has only Thorpe in support, we elect the presumption reflected in the more recent decision in Bowen that "[a] statute is deemed to be effective only for the future unless a contrary intent appears." Kaiser, 110 S. Ct. at 1588 (Scalia, J., concurring).

Our decision not to apply the Bradley presumption is supported by the Supreme Court's decision in Bennett v. New Jersey, 470 U.S. 632 (1985). Bennett involved an attempt by the Secretary of Education to recover from the state of New Jersey Title I funds that the Secretary of Education had determined New Jersey misused during the years 1970 to 1972. New Jersey argued, relying on Bradley, that the 1978 amendments to Title I, which relaxed the eligibility requirements for Title I funds, should be applied retroactively to determine whether the 1970-72 funds were misused. The Third Circuit agreed, and remanded the case to the Department of Education to determine whether the disputed expenditures conformed

to the more lenient 1978 Title I standards. The Supreme Court reversed, concluding that the Third Circuit's reliance on the Bradley presumption was inappropriate.

Although Bennett in part based its holding on the unique contractual nature of the obligations arising under the Title I program, the Court also concluded that "Bradley itself suggest[s] that changes in substantive requirements for federal grants should not be presumed to operate retroactively." Id. at 638. The Court elaborated:

> [The Bradley] holding rested on the general principle that a court must apply the law in effect at the time of its decision, which Bradley concluded holds true even if the intervening law does not expressly state that it applies to pending cases. Bradley, however, expressly acknowledged limits to this principle. "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." This limitation comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.

Id. at 639 (citations omitted).

In this case DeVargas seeks to impose substantive liability on the LANL defendants in their individual capacities through a retroactive application of the Restoration Act to section 504. As in Bennett, we find compelling grounds for not invoking Bradley where to do

otherwise would conflict the "venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect," Bennett, 470 U.S. at 639. But see Leake, 695 F. Supp. 1414, 1417 (E.D.N.Y. 1988) (stating that the Restoration Act must be retroactively applied and Bennett is not controlling because the Restoration Act merely gives plaintiff a remedy to redress the violation of his rights), aff'd, 869 F.2d at 131 (affirming Leake for substantially the reasons given by the district court). We hold that the Restoration Act should not be applied retroactively.

IV.

We next address the remaining federal defendant, Gary Granere, the Acting Area Manager for the DOE's LANL office. DeVargas states that his "only claim against any federal defendant on this appeal is that Defendant Granere failed to adequately perform his duty to properly administer the University of California -- Mason & Hanger contract and failed to properly supervise the state and private defendants." We are uncertain whether DeVargas intends this statement to relate to his section 504 claim. Assuming arguendo that DeVargas can bring a section 504 suit against a federal employee for nonintentional conduct, we conclude that the analysis applicable to the individual LANL defendants is equally applicable here. Prior to the Restoration Act, section 504 was program-specific and did not encompass the actions of Granere. We affirm the dismissal of DeVargas's claims against Granere.

V.

We rest our holding that the district court properly dismissed DeVargas's section 504 claim on the applicable law and the intent of Congress. We therefore conclude that further factual development was unnecessary and that the district court did not abuse its discretion in rejecting DeVargas's request for further discovery under

Federal Rule of Civil Procedure 56(f). See Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984) (reviewing trial court's Rule 56(f) determination under an abuse of discretion standard).[12]

VI.

We now address DeVargas's argument that the application of IMD 6102 constituted a deprivation of his clearly established right to substantive due process of law under the fifth and fourteenth amendments. In DeVargas I we rejected a similar argument: that the application of IMD 6102 violated DeVaragas's [sic] clearly established rights under the equal protection clause of the fourteenth amendment. See DeVargas I, 844 F.2d 714 (10th Cir. 1988). DeVargas I ruled that because the defendants' actions did not implicate a fundamental constitutional right, there could be no constitutional violation if there was a rational relationship between the governmental objective and the conduct in question. We held that it was rational for the DOE to conclude that fully sighted persons would more capably guard the nuclear and classified material at LANL than persons

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[12] Because of our holding in this case, we need not resolve the open issue of whether section 504 permits the recovery of monetary damages for intentional discrimination. Compare Smith v. Robinson, 468 U.S. 992, 1020 n.24 (1984) ("Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504.") and Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1107 (9th Cir. 1987) (assuming availability of damages) and Carter v. Orleans Parish Pub. Schools, 725 F.2d 261, 264 (5th Cir. 1984) (per curiam) (assuming availability of damages for intentional violations) and Miener v. Missouri, 673 F.2d 969, 977-79 (8th Cir.), cert. denied, 459 U.S. 909, 916 (1982) with Board of Educ. of E. Windsor Regional School Dist. v. Diamond, 808 F.2d 987, 996 n.5 (3d Cir. 1986) (reserving question) and Manecke v. School Bd. of Pinellas County, 762 F.2d 912, 921-22 & n.8 (11th Cir. 1985) (availability of damages an "open" and "murky" question), cert. denied, 474 U.S. 1062 (1986) and Hurry v. Jones, 734 F.2d 879, 886 (1st Cir. 1984) (reserving question).

with visual handicaps. See DeVargas I, 844 F.2d at 725.

We engage in a similar analysis for a substantive due process challenge. See Oklahoma Ed. Ass'n v. Alcoholic Beverage Enforcement Comm'n, 889 F.2d 929, 935 (10th Cir. 1989). We first determine whether IMD 6102 infringes on any fundamental constitutional right. We conclude that it does not. See id.; Coleman v. Darden, 595 F.2d 533, 538 (10th Cir.)(no fundamental constitutional right to government employment), cert. denied, 444 U.S. 927 (1979); Oklahoma Ed. Ass'n, 889 F.2d at 932-33 (no fundamental constitutional right to private employment). We also note that IMD 6102 is not like the statutory conclusive presumption struck down in Cleveland Board of Education v. LaFluer, 414 U.S. 632 (1974), which required school teachers to take maternity leave without pay beginning five months before the expected birth of child. LaFluer rested on the importance of restricting governmental intrusion into "matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 640 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)). See also Weinberger v. Salfi, 422 U.S. 749, 771 (1975). There is no governmental intrusion concerning a fundamental right at issue in this case. We therefore require only that IMD 6102 bear a rational relationship to a legitimate governmental purpose, see Oklahoma Ed. Ass'n, 889 F.2d at 935. The governmental concern with protecting the classified and nuclear material at LANL, together with "the logical inference that a fully sighted person may perform those security functions more capably than an individual only partially sighted, go far to show such a rational basis." DeVargas I, 844 F.2d at 725.

VII.

Finally, we address DeVargas's claim under 18 U.S.C. section 1983. Because there is no violation of either section 504 of the Rehabilitation Act or substan-

tive due process under the Constitution, no violation of law exists upon which DeVargas may rest a section 1983 suit. We hold that the district court properly dismissed the section 1983 claim.

VIII.

We **AFFIRM** the district court's grant of summary judgment in favor of the defendants.

[Filed August 9, 1990]

Supreme Court, U.S.
FILED
DEC 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-720

In the

Supreme Court of the United States

October Term, 1990

ALFREDO DeVARGAS,

Petitioner,

v.

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH E. EARNEST
(*Counsel of Record*)
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

LAURIE A. VOGEL
CHERPELIS VOGEL AND SALAZAR, P.A.
Post Office Box 37380
Albuquerque, New Mexico 87176-7380
(505) 265-7825

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In addition and in the alternative to the question set forth in the Petition:

Whether judgment in favor of the respondents should be affirmed even if the Civil Rights Restoration Act of 1987 applies retroactively, thereby making it unnecessary to reach the question of retroactive application?

Resolution of this question involves the following questions:

1. Whether Mason & Hanger-Silas Mason Co., Inc. is a "recipient" of federal financial assistance or part of the "operations" of the Regents of the University of California?

2. Whether judgment should be affirmed on the ground that the contracts at issue are not awards of assistance and do not create a basis for liability under § 504 of the Rehabilitation Act of 1973, when judgment was affirmed by the Court of Appeals in favor of the Respondents Mason & Hanger-Silas Mason Co., Inc., Hook, and Hardwick on this ground independently of consideration of retroactive application of the Civil Rights Restoration Act of 1987?

3. Whether an action for damages (the only relief arguably remaining) can be maintained against the respondents under § 504 of the Rehabilitation Act of 1973 or 42 U.S.C. § 1983 (1988) on the basis of the record in this case? Included in this question are the following questions:

a. Whether the federal regulation at issue is mandatory in nature and does not provide for a discretionary review?

b. Whether the record establishes a lack of intentional discrimination on the part of the respondents or whether the

QUESTIONS PRESENTED – Continued

respondents are entitled to an extension of the grant of qualified immunity entered by the Court of Appeals to the current claims under 42 U.S.C. § 1983 (1988) and § 504 of the Rehabilitation Act of 1973.

RULE 28.1 LISTING

Respondent Mason & Hanger-Silas Mason Co., Inc. ("Mason & Hanger") is incorporated under the laws of the State of West Virginia. The parent corporation of Mason & Hanger is The Mason Company. Mason & Hanger has four subsidiary corporations that are not wholly owned by it: Benchmark Electronics, Inc.; Mason & Hanger Service, Inc.; Mason & Hanger National, Inc.; and Mason Chamberlain, Inc. In addition, Mason & Hanger has one affiliated corporation that is not wholly owned by it or its parent corporation: Duchossois Industries, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATUTES AND REGULATIONS INVOLVED..... 2

STATEMENT OF THE CASE 3

A. Statement of Facts 3

1. The Federal Facility, Procurement Contracts, and Regulations at Issue 3

2. DeVargas' Application for Employment..... 6

B. Proceedings Below 9

REASONS FOR DENYING THE WRIT..... 12

I. THE OPINION OF THE COURT OF APPEALS WITH REGARD TO THE APPLICATION OF THE RESTORATION ACT IS CORRECT AND, IN ANY EVENT, IS ONE OF VERY LIMITED IMPACT .. 12

II. THE SAME RESULT SHOULD BE REACHED REGARDLESS OF RETROACTIVE APPLICATION OF THE RESTORATION ACT 15

A. Mason & Hanger Is Neither a "Recipient" of Federal Financial Assistance Nor Part of the "Operations" of the University 15

B. Judgment Should Be Affirmed on the Ground That the Contracts at Issue Are Not Awards of Assistance and Do Not Create a Basis for Liability Under § 504 20

Page

1. Judgment Was Entered in Favor of the Mason & Hanger Respondents on Grounds Independent From the Consideration of the Retroactive Application of the Restoration Act. 21

2. Judgment Below Should be Affirmed for the University Respondents on the Same Ground as That for the Mason & Hanger Respondents. 21

C. An Action for Damages Under § 504 or § 1983 Cannot Be Maintained Against the Respondents on the Basis of the Record in This Case. 22

1. Mason & Hanger Properly Followed a Federal Regulation Mandatorily Prohibiting the Employment of One-Eyed Individuals as Security Inspectors at Federal Facilities . . 23

2. Respondents Did Not Intentionally Discriminate Against the Petitioner and Are Entitled to Qualified Good Faith Immunity . . . 26

CONCLUSION 30

Appendix Submitted as Separate Document

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 28

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 14

Bradley v. Richmond School Bd., 416 U.S. 969 (1974) 14

Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981) 28

Carter v. Orleans Parish Pub. Schools, 725 F.2d 261 (5th Cir. 1984) (*per curiam*) 27

Chaplin v. Consolidated Edison Co., 587 F. Supp. 519 (S.D.N.Y. 1984) 24

Consolidated Rail Corp. v. Darrone, 465 U.S. 629 (1984) 26, 27, 28

Cousins v. Secretary of United States Dep't of Transp., 880 F.2d 603 (1st Cir. 1989) (*en banc*) 23

Eivens v. Adventist Health Sys./E. & Middle America, Inc., 651 F. Supp. 340 (D. Kan. 1987) 20

Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985) 27

Grove City College v. Bell, 465 U.S. 555 (1984) 28

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) 26, 27

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 27, 28, 29

Jackson v. Maine, 544 A.2d 291 (Me. 1988), *cert. denied*, 109 S. Ct. 3185 (1989) 24

Page

Jeldness v. Watson, 857 F.2d 1478 (9th Cir. 1988) (unpubl. table opin.) (WESTLAW, CTA database) 13

Kaiser Aluminum & Chem. Co. v. Bonjorno, 110 S. Ct. 1570 (1990) 14

Kohl v. Woodhaven Learning Center, 865 F.2d 930, (8th Cir.), *cert. denied*, 110 S.Ct. 239 (1989) 13

Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348 (5th Cir. 1983) 29

Monell v. Department of Social Serv., 436 U.S. 658 (1978) 24

O'Keefe v. Niagara Mohawk Power Corp., 714 F. Supp. 622 (N.D.N.Y. 1989) 19

Pfeiffer v. Marion Center Area School Dist., 59 U.S.L.W. 2294 (3d Cir. Oct. 30, 1990) (WESTLAW, 1990 WL 163389) 13

Rizzo v. Goode, 423 U.S. 362 (1976) 24

Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) 28

Timms v. Metropolitan School Dist., 722 F.2d 1310 (7th Cir. 1983) 27

United States Dep't of Transp. v. Paralyzed Veterans of America, 477 U.S. 597 (1986) 18, 19, 20

United States v. Larionoff, 431 U.S. 864 (1977) 26

STATUTES, REGULATIONS, AND RULES

42 U.S.C. § 1983 (1988) 9, 10, 22, 27, 28, 29

Administrative Procedure Act, *as amended* 5 U.S.C. §§ 701-706 (1988) 23

Page

Atomic Energy Act of 1954, *as amended* 42 U.S.C. §§ 2011-2013, 2051 (1988) 11

Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (Mar. 22, 1988) ..... *passim*

Physical Protection of Security Interests, 10 C.F.R. pt. 1046 (1990) 2, 5, 6, 8

Rehabilitation Act of 1973, *as amended*

§ 504, 29 U.S.C. § 794 (1988) ..... *passim*

§ 505, 29 U.S.C. § 794a (1988) 26

Sup. Ct. Rule 15.1 15

United States Department of Energy Interim Management Directive No. 6102, Appendix IV, "Protective Personnel" (Jan. 31, 1978) 2, 4, 5, 7, 8, 9, 10, 11, 22, 23, 25, 26, 27

LEGISLATIVE HISTORY AND CONGRESSIONAL HEARINGS

Hearings Before the Subcomm. on Procurement and Military Nuclear Systems of the House Comm. on Armed Services (Jan. 9, 1981) 3-4, 5, 17

S. Rep. No. 64, 100th Cong., 1st Sess. (1987) 19, 20

No. 90-720

In The

Supreme Court of the United States

October Term, 1990

ALFREDO DeVARGAS,

Petitioner,

v.

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

All respondents hereby respectfully urge the Court to deny the issuance of the writ of *certiorari* sought by the petitioner. In the alternative that the Court were to choose to review the judgment below, respondents urge that a writ of *certiorari* should be issued only with respect to Respondents Kerr, Pogna, and Walterscheid and only for the purpose of summary affirmance or remand to the Court of Appeals.

OPINIONS BELOW

This action was resolved below by a series of partial summary judgments and two appeals. The operative facts of

the case were recognized primarily in one opinion by the District Court and one by the Court of Appeals, neither of which are included in the Appendix to the Petition.[1] The Memorandum Opinion and Order of the District Court entered on October 21, 1986, is set forth in the Appendix to this Brief[2] at 1a-11a, and the Opinion of the Court of Appeals entered on April 7, 1988, and reported at 844 F.2d 714 is set forth in the Appendix to this Brief at 13a-43a.

STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, *as amended* 29 U.S.C. § 794 (1988) [hereinafter § 504], is set forth in full in the Appendix to this Brief at 45a-47a. The relevant language of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (Mar. 22, 1988) [hereinafter the Restoration Act], is incorporated into the current version of § 504. United States Department of Energy Interim Management Directive No. 6102, Appendix IV, "Protective Personnel" (Jan. 31, 1978) [hereinafter IMD 6102], which was the basis for the action taken by respondents, is set forth in the Appendix to this Brief at 49a-112a. The regulations which superseded IMD 6102 in 1984, Physical Protection of Security Interests, 10 C.F.R. pt. 1046 (1990), are set forth in the Appendix to this Brief at 114a-134a.

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[1] The Appendix contained in the Petition will be cited herein as "Pet. App."

[2] The separate Appendix to this Brief will be cited herein as "Br. App."

STATEMENT OF THE CASE

A fairly lengthy statement of facts and proceedings below is necessary to clarify the basis for the issues before the Court.

A. Statement of Facts

The facts stated herein are those established in the record below for purposes of the orders granting summary judgment by uncontradicted affidavits, authenticated documents, congressional hearings, deposition testimony, and discovery responses.

1. The Federal Facility, Procurement Contracts, and Regulations at Issue

The Regents of the University of California (the "University") operate facilities at Los Alamos National Laboratory (the "Laboratory") on behalf of the United States Department of Energy ("DOE"), pursuant to a prime procurement contract between DOE and the University. The Laboratory is a DOE facility covering approximately 40,000 acres of rough, heavily forested, mountainous terrain. The Laboratory is involved in atomic weapons development and research, as well as other scientific and highly classified research.

Mason & Hanger-Silas Mason Co., Inc. ("Mason & Hanger") is a West Virginia corporation. Mason & Hanger provides security personnel at several government sites around the country.

Prior to May 1981, security at the Laboratory was provided by a federally employed security force. The *Hearings Before the Subcommittee on Procurement and Military*

Nuclear Systems of the House Committee on Armed Services (Jan. 9, 1981) [hereinafter the *Hearings*][3] involved the transfer of security functions from the then federally employed service to a private contractor. Those *Hearings* detail the nature and history of the security force at the Laboratory; the analysis that led the government to investigate private contracting and to conclude that it was financially beneficial to obtain security personnel from a private contractor; and the selection of Mason & Hanger through competitive proposals.

On May 6, 1981, the University and Mason & Hanger entered into a subcontract, under which Mason & Hanger assumed employment of members of the previously federally employed security force at the Laboratory and began furnishing an enhanced security force for the protection of the Laboratory. The subcontract requires Mason & Hanger to employ, train, and provide security personnel for the protection of the Laboratory. The only function that Mason & Hanger provides at the Laboratory is the provision of security personnel pursuant to the subcontract. All funds or other benefits received by Mason & Hanger for the provision of security personnel at the Laboratory are received pursuant to this subcontract.

The subcontract delegates and charges Mason & Hanger with the responsibility of applying and enforcing DOE regulations relative to the provision of security forces at the Laboratory. In the period from May 1981 until November 1984, IMD 6102 was Appendix M to the subcontract, and Mason & Hanger was required both by federal regulation and by the

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[3] The transcript and exhibits of the *Hearings* are part of the record below.

subcontract to employ only personnel who met the requirements of IMD 6102.

Both IMD 6102 and the 1984 successor regulations provide for two distinct positions for security personnel – guards and security inspectors. The two positions have different responsibilities and have different medical and physical qualifications. Security inspectors have to be able to defend both the physical facilities and the security of the Laboratory from possible "terrorist attack, sabotage, espionage, theft and internal diversion." *Hearings* at 9. Accordingly, all security inspectors have to be capable of, among other things, foot and motor patrols, responding to industrial and forest fires, handling special nuclear materials, and combatting sophisticated terrorist groups. *Id.* at 9-10. Because of the highly sensitive nature of the Laboratory, only security inspectors are deployed there – there are no guard positions available at the Laboratory.

Although IMD 6102 permitted one-eyed individuals to be employed as guards, § A.9.b(5) (Br. App. at 72a), it mandatorily disqualified one-eyed individuals from the position of security inspector, § A.6.b(8) (Br. App. at 67a). IMD 6102 contained no provision for a medical or practical test to obtain a waiver of the medical disqualification of having sight in only one eye. It only provided for medical review of conditions in which the degree of the medical disqualification was at issue. *See* § A.6.c (Br. App. at 68a-69a).

In December 1984, IMD 6102 was superseded by new regulations governing the employment of security personnel at DOE facilities. The successor regulations added a provision that allows DOE (not the contractor) to issue a waiver of the medical disqualification of having sight in only one eye, if the

applicant is otherwise fully qualified and "demonstrates by medical examination and/or practical test . . . the ability to perform effectively and safely all routine and emergency duties." 10 C.F.R. pt. 1046, app. A § G(1)(b) (Br. App. at 129a-130a). The 1984 successor regulations further provide for review of such waivers and administrative appeal within DOE for aggrieved individuals. *Id.*, app. A § G(1)(d)-(e) (Br. App. at 130a).

2. DeVargas' Application for Employment

The petitioner, Alfredo DeVargas, has sight in only one eye. In November 1981, DeVargas submitted an application to Mason & Hanger for employment as a security inspector in response to a job description issued by Mason & Hanger. It is factually disputed whether a position was actually available at that time and whether DeVargas would have been otherwise qualified for a position as a security inspector, if a position were available.[4] Respondents have stipulated to availability

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[4] DeVargas' recitation of his qualifications and statement that they are "undisputed in the record" (Pet. at 4-5) is erroneous. Respondents had included in their motion for summary judgment on the second amended complaint, an issue that DeVargas was not "otherwise qualified." The supporting evidence to that motion shows that, because of the significant security concerns involved, Mason & Hanger required employees to list all prior employment which was investigated in detail. The evidence further shows that DeVargas had discretionarily omitted prior employers in his application; that DeVargas had been officially reprimanded as a police officer for failure to appear for work, for insubordination, and for failure to follow required rules, and that those reprimands had resulted in his resignation as a police officer; and that DeVargas illegally used controlled substances. These matters would have disqualified DeVargas from further consideration. In addition, all applicants would have to obtain a security clearance from DOE, a matter over which respondents

(Continued on following page)

of the position and DeVargas' qualifications, however, solely for purposes of their motions for summary judgment on which judgment below is based.

DeVargas' application states on its face that he had lost sight in one eye. At the time he submitted his application, DeVargas requested to speak with someone at Mason & Hanger regarding the possibility of a job. Respondent Hook, then Administrative Manager of Mason & Hanger, in reviewing DeVargas' application prior to meeting with him, consulted with Robert E. Everhart, Chief of Security for Mason & Hanger, and Respondent Hardwick, then Mason & Hanger's Contract Manager, concerning whether a one-eyed applicant could be employed as a security inspector. They concluded that IMD 6102 mandatorily disqualified one-eyed individuals from positions as security inspectors. Hook then informed DeVargas that he was disqualified from employment as a security inspector. At DeVargas' request, Hook subsequently sent a letter to DeVargas specifying the basis for the disqualification.

More than a year later, in March 1983, DeVargas' counsel sent a letter to Mason & Hanger requesting that it

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(Continued from previous page)

have no control. Because of agreement between counsel as to a discovery matter, however, the District Court was requested not to rule on the issue of qualifications at that time. Summary judgment was subsequently rendered on other issues.

The record also reflects that, prior to 1981, DeVargas had been given a "4-F" status by the armed forces because of his lack of sight in one eye and, accordingly, never served in the military. Since his application to Mason & Hanger, DeVargas has been denied employment by a private trucking firm because of Department of Transportation regulations that prohibit one-eyed individuals from driving trucks hauling hazardous materials.

reconsider hiring DeVargas.[5] At that time, Hook, Everhart, and Hardwick again discussed the provisions of IMD 6102 and again concluded that it mandatorily disqualified one-eyed applicants from employment as security inspectors. This time, Hook also contacted Respondent Pogna, a University employee who was then the Laboratory's Assistant Division Leader for the Security and Safeguards Division, to ensure that Mason & Hanger's interpretation of IMD 6102 was in accordance with that of the Laboratory. In response to the inquiry, Pogna asked Respondent Walterscheid, who is also a University employee and Deputy Laboratory Counsel, for his opinion as to whether IMD 6102 mandatorily disqualified a one-eyed individual from employment as a security inspector. Walterscheid informed Pogna that he interpreted the disqualification to be mandatory and not subject to review. Shortly after consulting with Walterscheid, on April 1, 1983, Pogna sent a memorandum to Hardwick setting forth Walterscheid's opinion. Upon receipt of the memorandum, Hardwick sent word through Mason & Hanger's counsel to DeVargas' counsel that Mason & Hanger maintained its position that DeVargas was disqualified from employment under IMD 6102.[6]

DeVargas never reapplied for a position as a security inspector under the 1984 successor regulations to IMD 6102,

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[5] Contrary to his assertion (Pet. at 5), DeVargas never reapplied for the position, in 1983 or thereafter.

[6] Respondent Kerr was also a University employee in 1983 and was then Director of the University's operations at the Laboratory. Kerr had no involvement in, or knowledge of, the events relative to DeVargas' application.

under which medically disqualified but otherwise fully qualified applicants may be considered for waiver by DOE.

B. Proceedings Below

This action was initially filed on November 8, 1983. Defendants below were the current respondents plus the University, DOE, certain officials and employees of DOE, and fictitious individuals. After discovery and preliminary motions, on July 26, 1984, the District Court granted DeVargas' request to file an amended complaint. The first amended complaint alleged violations of § 504, violations of 42 U.S.C. § 1983 (1988) [hereinafter § 1983], and direct violations of various provisions of the Constitution. With regard to the basis for his § 504 action, DeVargas pleaded solely that the prime contract and subcontract were in fact awards of assistance and therefore subjected the University and Mason & Hanger to § 504 liability. With regard to IMD 6102, DeVargas alleged that he was entitled to a waiver of his disqualification and that all of the defendants discriminated against him in denying that waiver.[7]

After further discovery, on October 10, 1984, defendants filed a comprehensive consolidated motion to dismiss and for summary judgment, along with certain other motions on particular procedural and jurisdictional matters. On April 9, 1986, the District Court entered a Memorandum Opinion and Order which, among other things, dismissed the § 504 claim

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[7] DeVargas alleged discrimination on the basis of handicap, national origin, freedom of association, and speech, as well as a conspiracy among all the defendants, as the reasons that defendants refused to process his application.

and the derivative § 1983 claim based on § 504 on the basis that the contracts at issue were not awards of assistance. (Pet. App. at 2a-10a).

Because the District Court had denied defendants' motion for summary judgment, on June 9, 1986, all remaining defendants filed a supplemental motion, urging the District Court to reconsider its earlier ruling and to grant summary judgment in favor of all defendants on the grounds of qualified good faith immunity. On October 21, 1986, the District Court entered a second Memorandum Opinion and Order, finding that the facts established in the record supported qualified good faith immunity as to all of DeVargas' § 1983 claims and granting summary judgment on that basis to all DOE and University employees. (App. at 3a-6a). The District Court, however, denied qualified good faith immunity to Mason & Hanger and all Mason & Hanger employees on the basis of lack of governmental status. (App. at 6a-8a).

Following that ruling, the Mason & Hanger defendants filed a collateral order appeal to the Court of Appeals. On April 7, 1988, the Court of Appeals entered an opinion affirming the grant of qualified good faith immunity and extending it to all defendants. 844 F.2d at 718-25 (Br. App. at 24a-43a). In the course of its opinion, the Court of Appeals held that IMD 6102 § A.6.b(8) stated a mandatory disqualification that was not subject to waiver. 844 F.2d at 725 (Br. App. at 41a-42a).

In the meantime, however, fairly extensive discovery had been taken in the District Court proceedings and, on April 4, 1988, three days before the Court of Appeals ruled on the qualified good faith immunity appeal, DeVargas was allowed to amend his complaint again.

On May 20, 1988, defendants filed a consolidated motion for summary judgment directed to all of the claims in the second amended complaint. On December 14, 1988, the District Court entered a Memorandum Opinion and Order dismissing the case in its entirety. (Pet. App. at 29a-39a). In this opinion, the District Court recognized the Court of Appeals' holding, and held, itself, that IMD 6102 § A.6.b(8) was mandatory and not subject to waiver. (Pet. App. at 37a-38a).

Throughout the proceedings in both the District Court and the Court of Appeals, DeVargas argued the existence of § 504 liability based solely on his contention that the prime contract and the subcontract were awards of assistance under the Atomic Energy Act of 1954, *as amended* 42 U.S.C. §§ 2011-2013, 2051 (1988). (*See* Pet. App. at 2a-8a, 48a-50a). At no time in the proceedings before the District Court, in his docketing statement, in his briefing on appeal, or in his oral argument in March 1990 did DeVargas mention the Restoration Act or any of the changes in § 504 made by the Restoration Act.[8] DeVargas first raised this issue in a letter to the Court of Appeals filed after oral argument.[9]

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[8] Indeed, the version of § 504 that was set forth and briefed in both DeVargas' appellate brief and the federal defendants' appellate brief (cross-adopted on the § 504 issue below by respondents) was the pre-Restoration Act version.

[9] DeVargas' letter to the Court of Appeals following argument erroneously premises its propriety on a claim that counsel for respondents raised the issue of program specificity in oral argument. What counsel pointed out to the Court of Appeals on argument was that the University and Mason & Hanger are different entities, a matter discussed below (at 15-20) that goes beyond program specificity and does not implicate the retroactive application of the Restoration Act.

Because the issue of retroactive application of the Restoration Act was raised by letter after oral argument, neither respondents nor the federal defendants, who were represented before the Court of Appeals by counsel from the United States Department of Justice, had the opportunity to make a presentation to the Court of Appeals on the issue of retroactive application of the Restoration Act or possible alternatives to that issue.

The Court of Appeals affirmed judgment on all grounds. It chose to approach the § 504 issue on two different bases. First, it held that the Mason & Hanger defendants – Respondents Mason & Hanger, Hook, and Hardwick – were not liable because Mason & Hanger did not receive federal financial assistance through its contract within the meaning of § 504. 911 F.2d at 1382-83 (Pet. App. at 48a-50a). Then, it went on to decide the application of § 504 to the University defendants – Respondents Kerr, Pogna, and Walterscheid – and to the remaining federal defendant – Gary Granere, not named as a respondent here – on the basis that the Restoration Act is not subject to retroactive application. 911 F.2d at 1383-93 (Pet. App. at 51a-72a).

REASONS FOR DENYING THE WRIT

I. THE OPINION OF THE COURT OF APPEALS WITH REGARD TO THE APPLICATION OF THE RESTORATION ACT IS CORRECT AND, IN ANY EVENT, IS ONE OF VERY LIMITED IMPACT.

Respondents fully support the decision of the Court of Appeals that the Restoration Act does not have retroactive effect and urge that it is correct in its result. Respondents can

add little to the original, well-reasoned, and impressively thorough decision of the Court of Appeals on this point.

By its very logic and application, however, the decision of the Court of Appeals is limited to the Restoration Act, itself. The holding requires and undertook a searching review of the language and legislative history of the particular statute at issue. 911 F.2d at 1385-88 (Pet. App. at 53a-62a). Although respondents do not have access to any sort of index by which they can quantify a precise number of cases, it is reasonable to presume that only a very few cases remain to which the question of retroactivity of the Restoration Act could apply.[10] Thus, although there is a split in the Circuits on this issue, the actual application and influence of the decision below will likely be quite limited.[11]

Although DeVargas argues that the Court of Appeals' decision is inconsistent with congressional intent (Pet. at 14-16), the holding of the Court of Appeals speaks for itself in this regard, having diligently searched and found there to be no clear congressional intent in the language and history of

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[10] A search on Westlaw for all cases using the term, "Restoration Act," located only two instances wherein Courts of Appeals have remanded cases to district courts for consideration of whether the Restoration Act applies retroactively: *Kohl v. Woodhaven Learning Center*, 865 F.2d 930, 941 n.7 (8th Cir.), *cert. denied*, 110 S.Ct. 239 (1989), and *Jeldness v. Watson*, 857 F.2d 1478 (9th Cir. 1988) (unpubl. table opin.) (WESTLAW, CTA database at 8). Respondents have ascertained from counsel in those cases that the *Kohl* case has been dismissed, while the *Jeldness* litigation is still active. *See also Pfeiffer v. Marion Center Area School Dist.*, 59 U.S.L.W. 2294 (3d Cir. Oct. 30, 1990) (WESTLAW, 1990 WL 163389 at 18).

[11] Moreover, the holding of the Tenth Circuit is a panel decision which, if in error, may later be corrected by the Court of Appeals *en banc*. DeVargas filed no suggestion for rehearing *en banc* in this case.

the Restoration Act to apply the statute retroactively. 911 F.2d at 1385-88 (Pet. App. at 53a-62a). In addition, the outcome under the particular facts of this case should be the same regardless of whether the Restoration Act is applied retroactively.[12] Accordingly, the result in this particular case can in no way be said to be inconsistent with congressional intent.

DeVargas also argues (at 16-18) that the import of the issue with regard to the Restoration Act is heightened by the Court of Appeals' resolution of the "apparent tension" between *Bradley v. Richmond School Board*, 416 U.S. 969 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). *See* 911 F.2d at 1388-93 (Pet. App. at 62a-72a). This construction, while of significant legal interest, cannot be said to represent specific differences in the Circuits, as the outcome of a review conducted under the particular method of analysis adopted by the Court of Appeals here will not necessarily conflict with the outcome of a review conducted by another method in any particular situation. Moreover, any attempt to articulate the specific method of interpreting congressional intent for all statutes must have import beyond the civil rights area and is fraught with problems of anticipation. The Court has recently chosen not to address this issue of construction, even when the opportunity clearly presented itself. *See, e.g., Kaiser Aluminum & Chem. Co. v. Bonjorno*, 110 S. Ct. 1570, 1576-77 (1990).

A final matter that argues against granting *certiorari* is the fact that DeVargas has chosen to drop the last federal defendant – Gary Granere, Acting Manager of the DOE Los Alamos Area Office – as a respondent herein. (*See* Pet. at 2d

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[12] *See infra* at 15-29.

unn. p.). Removing Granere as a respondent leaves only non-federal respondents and means that the federal government will not appear to argue either the proper method to determine congressional intent with regard to retroactive application of federal statutes or the proper interpretation of the particular DOE regulations at issue.[13] Certainly there should be input from the federal government as to the issues presented in this case, if they were to be decided.

Thus, because the issue presented has been correctly decided and, in any event, is one of very limited impact, the Court should deny issuance of a writ of *certiorari*.

II. THE SAME RESULT SHOULD BE REACHED REGARDLESS OF RETROACTIVE APPLICATION OF THE RESTORATION ACT.

Pursuant to Supreme Court Rule 15.1, this portion of the brief sets forth in detail what additional issues are involved in resolving the question posed by DeVargas in his Petition. The proper resolution of these issues in light of the record in this case demonstrates that it is unnecessary even to reach the issue of retroactive application of the Restoration Act, because the same result should obtain regardless of whether the Restoration Act is given retroactive application.

A. Mason & Hanger Is Neither a "Recipient" of Federal Financial Assistance Nor Part of the "Operations" of the University.

DeVargas continues, as he did below, to ignore the fact that the Laboratory is a DOE facility and that the contracts at

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[13] *See infra* at 23-26.

issue are part of a procurement contract system created for the benefit of the federal government. The statement in the Petition (at 5) that the University chose to delegate some of its duties to Mason & Hanger ignores the extensive record established below through the congressional hearings on the transfer of the previously federally employed security force at the Laboratory.

DeVargas assumes that Mason & Hanger, or at least the function performed by Mason & Hanger at the Laboratory, is a program of the University, and that once program specificity is removed by retroactive application of the Restoration Act, liability imparts to the University under § 504 for the actions of Mason & Hanger, because of federal assistance or grants received somewhere in the University's educational system.

Mason & Hanger, however, is not a program of the University performing the University's operations. Mason & Hanger and the University are separate entities performing separate functions in the service of the federal government at the Laboratory. Mason & Hanger is not a recipient of federal financial assistance. There is nothing in the Restoration Act, even if applied retroactively, which would make the University or its employees liable under § 504 for Mason & Hanger's failure to employ DeVargas, or make Mason & Hanger or its employees liable under § 504 based on receipt of federal grants or assistance by the University somewhere in its educational system.

The University operates facilities at the Laboratory on behalf of DOE. When the Laboratory was established as a permanent federal facility following World War II, the University declined to be involved in operations at the Laboratory

other than scientific and technical operations. *Hearings* at 25. Prior to May 1981, the protective service at the Laboratory was a federally employed force. At the behest of the federal Office of Management and Budget ("OMB") and DOE, competitive bidding was initiated to ascertain whether a private contractor could supply an enhanced protective force more economically than could the federal government. *Id.* at 7-14, 18-19, 21-22. Pursuant to OMB competitive bidding, with input from DOE and a congressional subcommittee, Mason & Hanger was selected to provide the private security force at the Laboratory. *Id.* That selection and subsequent subcontract were for the benefit of the federal government and the nation as a whole, not for the benefit of the University. Although Mason & Hanger's contract is structured so that it operates as a subcontract to the University's prime procurement contract, that structure merely dictates how contractual payments flow from DOE through the University to Mason & Hanger. The University reaps no financial benefit from its subcontract with Mason & Hanger.

The University's role in operating the Laboratory has never included the provision of security forces. While the University has some input and control over the security force for purposes of strength, deployment, and coordination, similar to the input and control that it had with the federally employed force, it is Mason & Hanger, not the University, which is charged with employing, training, and providing security personnel, as well as ensuring that those activities comply with appropriate federal regulations.

Thus, the provision of security forces is not part of the "operations" of the University at the Laboratory, and the operations of Mason & Hanger do not fall under the "all

operations" provision of § 504(b) for purposes of the University.

In addition, DeVargas applied for employment with Mason & Hanger, not with the University. It is Mason & Hanger which declined to process DeVargas' application. Although Mason & Hanger personnel, in an appropriate abundance of caution, sought advice from University personnel to ensure that they were proceeding in accordance with the mandatory federal regulation involved, ultimate responsibility for employing and providing the security force remains with Mason & Hanger, not with the University.

DeVargas apparently would urge that § 504 is no longer limited in coverage to the entity that receives federal funding, but that anytime a subject organization (or at least a university) has a contract with another organization, both organizations fall under § 504 liability and liability flows in both directions. That position, however, cannot be sustained in light of prior holdings of the Court under § 504, the plain language of the Restoration Act, or its legislative history.

Prior to enactment of the Restoration Act, the Court squarely held in *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 605-08 (1986), that the recipient of federal financial assistance under § 504 was the *entity* that actually received the federal financial assistance, because coverage of § 504 was in the nature of a contractual cost which could be terminated at the choice of the covered entity to avoid liability. The Court specifically rejected the concept of liability vicariously extending from one entity to another. *Id.* at 608. Although Congress intended in the Restoration Act to overrule program specificity within

entities by providing extensive definitions of the term, "program or activity," neither those changes nor the legislative history of § 504 indicate any intent by Congress to expand liability beyond the specific entity actually receiving federal financial assistance. *See* § 504(b); S. Rep. No. 64, 100th Cong., 1st Sess. 16-20 (1987).[14] Where Congress intended to cover associated or affiliated organizations in the Restoration Act, it did so specifically. *See* § 504(b)(4);[15] S. Rep. No. 64, *supra*, at 19-20.

Liability under § 504 does not reach contractors of covered entities.[16] To be covered under § 504(b)(3), a corporation

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[14] Indeed, the Senate Committee on Labor and Human Resources, which issued the only legislative report on the Restoration Act, stated specifically that the Court's ruling in *Paralyzed Veterans* was preserved under the Act.

> [The Restoration Act] does not overrule or alter the Supreme Court ruling in the case *Department of Transportation v. Paralyzed Veterans of America*, -- U.S. --- (1986), that airline companies are not recipients of federal financial assistance as a result of their use of federally-assisted airports or federal air traffic controllers.

S. Rep. 64, *supra*, at 29.

[15] DeVargas' expansive reading of the Restoration Act would render as surplusage the precise language of § 504(b)(4).

[16] A strikingly similar case on this issue is *O'Keefe v. Niagara Mohawk Power Corp.*, 714 F. Supp. 622, 630-31 (N.D.N.Y. 1989). The plaintiff there was an instructor hired by a subcontractor of Oak Ridge Associated Universities ("Oak Ridge"), a DOE prime contractor, to teach courses at facilities operated by Oak Ridge. When the subcontractor fired the plaintiff, the plaintiff sued the subcontractor under § 504 and a panoply of claims similar to those made by DeVargas below. Relying on the authority of *Paralyzed Veterans*, the court in that case dismissed the claims under § 504, holding that, although Oak Ridge clearly received federal funding and was subject to § 504 liability, that fact did not subject the subcontractor-employer to § 504 liability.

must receive the federal grant or assistance itself; it cannot be vicariously liable for the receipt of assistance by another entity, unless it is created by that entity under § 504(b)(4). *See* S. Rep. 64, *supra*, at 17-19. And the entity with which a corporation contracts (here the University) cannot be held vicariously liable under § 504 for the acts of the contracting corporation,[17] particularly where, as here, the corporation itself is not liable under § 504.

In sum, the University and Mason & Hanger are different entities performing different functions at the Laboratory. Mason & Hanger is neither a "recipient" of federal financial assistance nor part of the "operations" of the University. Accordingly, the same result should be reached regardless of the retroactive application of the Restoration Act.

B. Judgment Should Be Affirmed on the Ground That the Contracts at Issue Are Not Awards of Assistance and Do Not Create a Basis for Liability Under § 504.

The Court of Appeals approached the § 504 issue on two different grounds. First, it held that the Mason & Hanger defendants were not liable under § 504, because Mason & Hanger's subcontract is not an award of assistance, and Mason & Hanger, therefore, does not receive federal financial assistance. 911 F.2d at 1382-83 (Pet. App. at 48a-50a). Then, the Court of Appeals went on to decide the application of

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[17] *See Eivens v. Adventist Health Sys./E. & Middle America, Inc.*, 651 F. Supp. 340, 343 (D. Kan. 1987) (holding under *Paralyzed Veterans* that a hospital holding company is not subject to § 504 liability based on receipt of federal assistance by the individual corporate hospitals).

§ 504 to the University and federal defendants on the basis that the Restoration Act is not subject to retroactive application. 911 F.2d at 1383-93 (Pet. App. at 51a-72a).

1. Judgment Was Entered in Favor of the Mason & Hanger Respondents on Grounds Independent From the Consideration of the Retroactive Application of the Restoration Act.

The Court of Appeals did not, and did not need to, reach the issue of the retroactive application of the Restoration Act in order to affirm the judgment in favor of the Mason & Hanger respondents. There is no evidence of financial assistance to Mason & Hanger in the record. Because the Court of Appeals affirmed judgment in favor of the Mason & Hanger respondents on grounds independent from the question presented in the Petition, the Mason & Hanger respondents – Mason & Hanger, Hook, and Hardwick – should be dismissed from this proceeding.

2. Judgment Below Should Be Affirmed for the University Respondents on the Same Ground as That for the Mason & Hanger Respondents.

The sole issue presented and litigated below with regard to § 504 was whether the contracts at issue were in fact awards of assistance. There is no evidence in the record of any federal grant or assistance to the University (outside of DeVargas' claims with regard to the contracts), because other grants were never at issue below.

There is no reason on the basis of the claims presented and state of the record to treat the University respondents – Respondents Kerr, Pogna, and Walterscheid – differently from

the Mason & Hanger respondents. Accordingly, judgment should be affirmed for all respondents on the basis that the contracts are not awards of assistance, without the necessity of reaching the issue of retroactive application of the Restoration Act.

C. An Action for Damages Under § 504 or § 1983 Cannot Be Maintained Against the Respondents on the Basis of the Record in This Case.

The only remedy even arguably remaining for DeVargas under § 504 or his derivative claim of violation of § 504 rights under § 1983[18] is that of damages.[19] The Court of Appeals avoided reaching the "open issue" of the availability of damages under § 504 by ruling instead on the retroactive application of the Restoration Act. 911 F. 2d at 1393 n.12 (Pet. App. at 73a n.12). Resolution of that issue, however, is unnecessary to this action, as DeVargas' current allegations fail under the record in this case to provide any basis whatsoever for a claim for damages either directly under § 504 or derivatively under § 1983.

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[18] The Court of Appeals dismissed DeVargas' derivative § 1983 claim on the ground that there was no basis for his underlying § 504 action. 911 F.2d at 1394 (Pet. App. at 74a-75a). It is unclear whether DeVargas intends to continue to pursue his § 1983 action along with his direct § 504 claim.

[19] The District Court dismissed all declaratory and equitable relief, including backpay, as relief, on the bases that IMD 6102 was mandatory and properly followed, that IMD 6102 had been superseded in 1984 by regulations under which an otherwise fully qualified applicant could be considered for waiver, and that DeVargas had not reapplied for a security inspector position under those successor regulations. (Pet. App. at 37a-39a). DeVargas did not appeal this dismissal to the Court of Appeals. *See* 911 F.2d at 1382 (Pet. App. at 48a).

1. Mason & Hanger Properly Followed a Federal Regulation Mandatorily Prohibiting the Employment of One-Eyed Individuals as Security Inspectors at Federal Facilities.

A determinative issue hidden in the Petition is the proper interpretation of IMD 6102. Although both the Court of Appeals, 844 F.2d at 725 (Br. App. at 41a-42a) and the District Court (Pet. App. at 37a-38a) ruled that IMD 6102 § A.6.b(8) mandatorily disqualified one-eyed individuals from employment as security inspectors without review, and DeVargas does not purport to raise that issue here, he nevertheless continues to claim that IMD 6102 provided for a medical waiver of his disability, which he was denied by respondents. (Pet. at 5). His erroneous position as to the interpretation of IMD 6102 is the linchpin of his claims under § 504 against the respondents.

In order to state a claim for damages against these respondents, Mason & Hanger must have had at least the opportunity to exercise discretion in its application of IMD 6102. If instead, as the record here demonstrates, Mason & Hanger properly followed the requirements of a mandatory federal regulation, then the appropriate action would be one against DOE officials under either § 504 or the Administrative Procedure Act, *as amended* 5 U.S.C. §§ 701-706 (1988), to effect a change in the regulation.[20] Because of the

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[20] A similar case to the present one on this issue is *Cousins v. Secretary of United States Department of Transportation*, 880 F.2d 603 (1st Cir. 1989) (*en banc*). In that case, a deaf individual was denied a job by a private employer, based on a Department of Transportation ("DOT") regulation that mandatorily disqualified deaf individuals from employment as interstate truck drivers. Just as in the present case,

(Continued on following page)

mandatory nature of the regulation at issue, any claim for damages against respondents here is without foundation.[21] It is fundamental that liability for damages under civil rights statutes only arises with regard to those persons whose discretionary acts cause the injury.[22] *See Monell v. Department of Social Serv.*, 436 U.S. 658, 692-94 (1978); *Rizzo v. Goode*, 423 U.S. 362, 370-71, 375-76 (1976).

(Continued from previous page)

DOT regulations there allowed for waiver of some medically disqualifying conditions, but not for the condition at issue. *Id.* at 604. The Court of Appeals there concluded that suits of that type should be brought against the government "as regulator" only under the Administrative Procedure Act, not under § 504. *Id.* at 605-06.

[21] An example of the proper resolution of this issue may be found in the opinion of the Supreme Court of Maine in *Jackson v. Maine*, 544 A.2d 291 (Me. 1988), *cert. denied*, 109 S. Ct. 3185 (1989). In that case, an applicant for the position of school bus driver for a local school district was denied the job, because of the regulations of a state educational department which mandatorily prohibited insulin-dependent diabetics from driving school buses. The applicant sued under both § 504 and the Maine Human Rights Act, alleging discrimination on the basis of handicap against the local school district, its officials, and state agencies and officials. The trial court found the local school district contingently liable to the applicant for damages. *Id.* at 294. On appeal, the Supreme Court of Maine reversed, holding that the fact that the local school district and its officials were "entirely blameless" for the application of the mandatory regulations negated any award of damages, and rejecting "the [trial] court's attempt to retain [the local school district] as a surrogate for the State." *Id.* at 296-97.

[22] *Cf. Chaplin v. Consolidated Edison Co.*, 587 F. Supp. 519, 520 (S.D.N.Y. 1984) (holding that corporate officials who are "*responsible* for policies which violate § 504 may be liable in their individual capacities under that section") (emphasis added).

The interpretation of IMD 6102 § A.6.b.(8) as mandatory without opportunity for waiver is the only reasonable reading of the regulation that maintains its structure, language, and intended distinctions.[23] Moreover, DOE intended and consistently interpreted IMD 6102 as mandatory in disqualifying one-eyed individuals from the position of security inspector

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[23] DeVargas' cavalier interpretation of IMD 6102 as providing for medical review under IMD 6102 § A.6.c (Br. App. at 68a-69a) in all cases would read significant portions of IMD 6102 and distinctions that were contained in that regulation entirely out of existence.

The list of conditions in subpart (b) of IMD 6102 § A.6 (Br. App. at 63a-68a) contains both discretionary and mandatory disqualifications. (As to the use of the word, "shall," as mandatory, *see* IMD 6102 § a.2.b (Br. App. at 50a).) Three of the four mandatory disqualifications (numbers 2, 6, and 10) contain their own specific medical review and standards for waiver. Attempting to read the broader IMD 6102 § A.6.c provision for medical review as applicable to these mandatory provisions makes the specific medical review and standards contained in these provisions meaningless and surplusage. Only the condition of being one-eyed (number 8) among these mandatory disqualifications operated to disqualify an individual without any further medical review whatsoever.

With regard to the one-eyed condition, the most dramatic example of the misreading urged by DeVargas results from comparing the security inspector standards in IMD 6102 §§ A.5 & 6 (Br. App. at 57a-69a) with the guard standards contained in IMD 6102 § A.9 & 10 (Br. App. at 71a-78a). The two sections for the two different levels of security employee are structurally similar and contain similar medical review standards. IMD 6102 § A.9.b(5) (Br. App. at 72a) provides that "[o]ne-eyed individuals *may qualify*" to be guards, subject to medical review, while IMD 6102 § A.6.b(8) (Br. App. at 67a) provides that "[a] one-eyed individual *shall be medically disqualified* for security inspector duties." (Emphasis added.) Despite the obviously different intent of these two sections, DeVargas' interpretation would treat applicants for the two different security positions in exactly the same manner.

without review.[24] With regard to complex administrative regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. 864, 872 (1977).

Mason & Hanger here properly followed a federal regulation that mandatorily prohibited the employment of one-eyed individuals as security inspectors, and, accordingly, there is no basis for any action for damages against respondents.

2. Respondents Did Not Intentionally Discriminate Against the Petitioner and Are Entitled to Qualified Good Faith Immunity.

Although a showing of intent may not be necessary to maintain an action for noncompensatory equitable relief under § 504, intentional discrimination or bad faith is a necessary element in the recovery of damages or other compensatory relief. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2, 607 n.27 (1983) (decision under Title VI of the Civil Rights Act of 1964);[25] *Consolidated Rail*

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[24] In support of summary judgment, defendants submitted the sworn declaration of Martin J. Dowd, who was Deputy Director of the Office of Safeguards and Security for DOE, a position which involved management responsibility for protection policies of DOE, including interpretation of those policies. Mr. Dowd's affidavit concerns DOE's intent, development, and interpretation of IMD 6102, particularly the provision requiring security inspectors to have sight in both eyes. Mr. Dowd states that IMD 6102 § A.6.b(8) was intended and consistently interpreted by DOE as requiring sight in both eyes and was not subject to qualification or waiver by either DOE or a contractor.

[25] The remedies for a violation of § 504 are those set forth in Title VI. 29 U.S.C. § 794a(a)(2) (1988). The Courts of Appeals have applied to

(Continued on following page)

Corp. v. Darrone, 465 U.S. 629, 630-31 & n.9 (1984) (applying the decision in *Guardians* to § 504).[26] The record in this case establishes that respondents did not intentionally discriminate against DeVargas or act in bad faith. Furthermore, respondents are clearly entitled to an extension of the grant of qualified good faith immunity previously determined by the Court of Appeals.

In the present case, the District Court (Br. App. at 3a-6a; Pet. App. at 31a-36a) and Court of Appeals, 844 F.2d at 718-25 (Br. App. at 24a-43a), granted all respondents summary judgment on the basis of qualified good faith immunity on all of the DeVargas' § 1983 claims, finding factually that Mason & Hanger reasonably followed IMD 6102 in declining to process DeVargas' application. The lower courts' determination of facts applies with equal force to the same incident and decision viewed with regard to § 504 rights.

Qualified good faith immunity, of course, turns on identification of "clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). There is nothing in

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§ 504 the holding in *Guardians* on the limited availability of damages under Title VI, requiring a showing of discriminatory intent for compensatory relief under § 504. *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1427-1428 (11th Cir. 1985); *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 262-263 (5th Cir. 1984) (*per curiam*); *Timms v. Metropolitan School Dist.*, 722 F.2d 1310, 1318 n.4 (7th Cir. 1983).

[26] In *Consolidated Rail*, the Court held that backpay would be available under § 504 upon a showing of intentional discrimination, but declined to opine on the availability of further compensatory relief.

the history of § 504 or the judicial interpretation of that statute that indicates that any of the respondents should have known that § 504 was not program specific in the period from 1981 to 1983 or should have acted in a different manner as a result. Indeed, the congressional history of the Restoration Act, itself, states that early Court of Appeals' decisions had held § 504 to be program specific, even prior to the decisions of this Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), and *Consolidated Rail*. S. Rep. 64, *supra*, at 10.[27] Accordingly, there is no basis whatsoever for any contention that it was clearly established, in a particularized sense, that respondents should have known that their actions would violate DeVargas' rights under § 504. *See Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987).

Although determinative of claims for damages under § 1983, a holding of qualified good faith immunity does not necessarily resolve the issue of subjective intent for purposes of a direct action under § 504. The very purpose of the doctrine of qualified good faith immunity has been to replace the element of subjective intent under § 1983 with one of objective knowledge, specifically because of the difficulty in negating allegations of intent for purposes of summary judgment. *Harlow*, 457 U.S. at 815-19. The facts established in this case, however, are sufficient also to negate any reasonable inference of intentional discrimination or bad faith and to

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[27] These pre-*Consolidated Rail* decisions are *Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981), and *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231-32 (7th Cir. 1980).

support summary judgment in favor of respondents on the issue of damages under § 504.[28]

In addition, if it were deemed necessary to urge that the theory of qualified good faith immunity should apply to direct actions under § 504 for damages against government officials or individuals in functionally equivalent positions,[29] then respondents urge the direct application of that doctrine. The costs of a subjective intent standard are as high, the distraction of public figures is as great, and the overall need for qualified immunity is as substantial in actions for damages directly under § 504 as in actions for damages under § 1983. *See Harlow*, 457 U.S. at 816-17.

Accordingly, an action for damages cannot be maintained under either § 504 or § 1983 against respondents, because they did not intentionally discriminate against DeVargas or act in bad faith, and because they are entitled to qualified good faith immunity.

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[28] *See Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1983) (holding for purposes of summary judgment that, where the record establishes that the defendants are attempting to follow government guidelines, there can be no finding of intentional discrimination on which to base a claim for damages under § 504).

[29] The Court of Appeals in this case held that the Mason & Hanger respondents were entitled to be considered for qualified good faith immunity along with the governmental defendants, because of Mason & Hanger's status as a federal subcontractor, the delegation to it of the responsibility of applying and enforcing federal regulations, and an analysis of the factors articulated in *Harlow*. 844 F.2d at 720-23 (Br. App. at 30a-37a).

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be denied. In the alternative that the Court were to choose to review the judgment below, a writ of *certiorari* should be issued only with respect to Respondents Kerr, Pogna, and Walterscheid and only for the purpose of summary affirmance or remand to the Court of Appeals.

Respectfully submitted,

JOSEPH E. EARNEST
(Counsel of Record)
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

LAURIE A. VOGEL
CHERPELIS VOGEL AND
SALAZAR, P.A.
Post Office Box 37380
Albuquerque, New Mexico
87176-7380
(505) 265-7826

Dated: December 18, 1990

(3)

No. 90-720

Supreme Court, U.S.
FILED
DEC 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1990

ALFREDO DeVARGAS,

Petitioner,

v.

MASON & HANGER-SILAS MASON CO., INC.; T.R. HOOK; DON HARDWICK; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Respondents.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH E. EARNEST
(Counsel of Record)
MONTGOMERY & ANDREWS, P.A.
Santa Fe, New Mexico 87504-2307
(505) 982-3873

LAURIE A. VOGEL
CHERPELIS VOGEL AND SALAZAR, P.A.
Post Office Box 37380
Albuquerque, New Mexico 87176-7380
(505) 265-7825

R. VERGARA PRINTING CO. (505) 473-1431

TABLE OF CONTENTS

	Page
Memorandum Opinion and Order of the District Court, October 21, 1986	1a
Opinion of the Court of Appeals April 7, 1988	13a
Section 504 of the Rehabilitation Act of 1973, as amended 29 U.S.C. § 794 (1988)	45a
United States Department of Energy Interim Management Directive No. 6102, Appendix IV, "Protective Personnel" (Jan. 31, 1978)	49a
Physical Protection of Security Interests, 10 C.F.R. pt. 1046 (1990)	114a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,
Plaintiff,

vs. CV No. 83-1674 HB

MASON & HANGER-SILAS MASON CO., INC.; T.R. HOOK; DON HARDWICK; THE UNITED STATES DEPARTMENT OF ENERGY; JOHN S. HERRINGTON; GARY GRANERE; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,
Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on defendants' supplemental motion for summary judgment on the issue of qualified good faith immunity, plaintiff's motion for relief pursuant to Rule 56(f), plaintiff's motion to compel production of documents for inspection and copying and defendants' renewed motion for a protective order. The court, having considered the motions, the memoranda and exhibits filed by the parties in conjunction therewith, the entire record, and consulted the applicable authorities, concludes that defendants' supplemental motion for summary judgment on the issue of qualified good faith immunity is well-taken and will be granted in part. Plaintiff's motion to compel production of documents for inspection and

copying is also well-taken and will be granted in part. Plaintiff's motion for relief pursuant to Rule 56(f) is not well-taken and will be denied, as will defendants' renewed motion for a protective order.

This a civil rights action arising out of the alleged refusal of defendants Mason & Hanger-Silas Mason Co., Inc., and its employees, T.R. Hook and Don Hardwick, to consider plaintiff's application for a position as a security inspector at the Los Alamos National Laboratory ("LANL") facilities in Los Alamos, New Mexico. Mason & Hanger employs individuals as security inspectors at LANL pursuant to a subcontract with LANL. LANL, in turn, is organized pursuant to a contract between the United States Department of Energy ("DOE") and the Regents of the University of California, and is engaged in weapons and atomic energy research.

I. Defendants' Supplemental Motion for Summary Judgment on Qualified Immunity

On April 9, 1986, this court issued a Memorandum Opinion and Order, in which defendants' motion for summary judgment as to many of the claims alleged in plaintiff's Complaint was granted in part and denied in part. This court denied defendants' motion for summary judgment on the basis of qualified, or "good faith" immunity as to Counts II, III and IV of plaintiff's Complaint. See DeVargas v. Mason & Hanger-Silas Mason Co, Inc., Civ. No. 83-1674, slip op. at 13, 15-16, 22-23, 26 (D. N.M. April 9, 1986). Defendants now present additional evidence in support of their "supplemental" motion for summary judgment on the issue of

qualified immunity and ask this court to reconsider its denial of such immunity in the April 9, 1986 Memorandum Opinion and Order.

The defense of qualified immunity, as articulated by the United States Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), provides that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Plaintiff argues that this court properly denied defendants' earlier motion for summary judgment on the basis of qualified immunity, because the law was clearly established that plaintiff could not be discriminated against on the basis of his handicap. Plaintiff has only one eye, and was denied employment as a security inspector at LANL pursuant to DOE regulation Interim Management Directive No. 6102 ("IMD 6102"), which provides that a "one-eyed individual shall be medically disqualified for security inspector duties." IMD 6102 § A 6 b (8). The question in this case is not, however, whether the law was clearly established that plaintiff could not be discriminated against on the basis of his handicap, but whether defendants reasonably should have known that their application of IMD 6102 would violate plaintiff's constitutional rights.

Defendants and plaintiff agree that Harlow mandates an inquiry into only objective factors; the defendants' subjective intent is not relevant to the question of the objective reasonableness of their conduct. In this case, IMD 6102 is one of many federal regulations required to be implemented in hiring

security personnel for LANL. Affidavit of Tommy R. Hook, § 2, Exhibit 1, Defendants' Supplemental Motion for Summary Judgment. Plaintiff does not dispute that at the time his application for employment was denied on the basis of IMD 6102, that regulation had not been declared unconstitutional by any court. Indeed, this court has since upheld the constitutionality of that regulation in its earlier Memorandum Opinion and Order in this matter. DeVargas v. Mason & Hanger-Silas Mason Co., Inc., supra, at 21-23. At the time plaintiff's application for employment was denied, therefore, it cannot be said that the law was clearly established that IMD 6102 was unconstitutional. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Harlow, supra.

Plaintiff argues, however, that defendants' failure to follow the medical review procedures specified in IMD 6102 § A 6 c makes suspect their reliance on the exclusion of one-eyed individuals in IMD 6102 § A 6 b (8). This argument lacks merit. First, the medical review procedures allow otherwise, medically unqualified applicants to be considered for medical qualification if a supplemental physical examination and other medical investigative procedures indicate that the applicant can safely and effectively perform all normal and emergency job duties. Unlike the provision excluding one-eyed individuals in IMD 6102 § A 6 b (8), the medical review provision is discretionary. Defendants were not, therefore, required to implement the medical review procedures. The Supreme Court has recognized that govern-

ment "officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.' " Davis v. Scherer, 468 U.S. 183, 196 (1984) (quoting P. Schuck, Suing Government 66 (1983)). Furthermore, in this case, defendants did not rely on their own interpretation of IMD 6102. After interviewing plaintiff in November, 1981, defendant Hook consulted with Robert E. Everhart, Mason & Hanger's Chief of Security, and defendant Hardwick, Mason & Hanger's Contract Manager. Affidavit of Tommy R. Hook, ¶5, Exhibit 1, Defendants' Supplemental Motion for Summary Judgment. They both interpreted the exclusion of one-eyed individuals as mandatory. Id. at ¶¶5,6. In March, 1983, when plaintiff again applied for a position as security inspector, the same three individuals again discussed IMD 6102, and drew the same conclusions about the mandatory nature of IMD 6102. Affidavit of Robert E. Everhart, ¶7, Exhibit 2, Defendants' Supplemental Motion for Summary Judgment. Even after consulting with Mr. Everhart and defendant Hardwick, defendant Hook verified their interpretation with defendant Pogna, LANL's Assistant Division Leader for the Security and Safeguards Division. Affidavit of Tommy R. Hook, supra, at ¶¶10, 11. Mr. Pogna verified his own opinion with defendant Walterscheid, Deputy Assistant Director-Legal Counsel at LANL, who was, in turn, of the opinion that the exclusion was mandatory and a valid regulation. Affidavit of Edward C. Walterscheid, ¶¶4-6, Exhibit 5, Defendants' Supplemental Motion for Summary Judgment. Therefore, in this case, as in Zook v. Brown, 575 F. Supp. 72 (C.D. Ill. 1983), defendants' actions were

reviewed by others, including at least one attorney. "If an attorney cannot determine that the law forbids certain government action, it cannot be found that individuals untrained in the nuances of constitutional law should have known that their conduct was identified as unlawful." Id. at 77.

Second, plaintiff errs when he suggests that defendants' subjective reliance on IMD 6102 § A 6 b (8) is a factor to be considered in determining whether they are entitled to claim the defense of qualified immunity, and that consideration of such subjective factors is appropriate in deciding a motion for summary judgment. The issue here is the reasonableness of the defendants' conduct, not whether they actually relied on the regulation. "Harlow v. Fitzgerald, supra, rejected the inquiry into state of mind in favor of a wholly objective standard." Davis v. Scherer, supra, at 191. Under the facts of this case, defendants are entitled to claim a defense of qualified immunity, because they should not reasonably have known that their application of IMD 6102 to deny plaintiff's application for employment as a security inspector would violate plaintiff's constitutional rights.

The defense of qualified immunity applies, however, only to actions against defendants in their individual capacities, Clulow v. State of Oklahoma, 700 F.2d 1291, 1299 n. 10 (10th Cir. 1983), and only to actions for money damages rather than prospective injunctive relief. Pulliam v. Allen, 466 U.S. 522, 541-42 (1984). Furthermore, the defense of qualified immunity may only be asserted by government officials. Plaintiff argues that defendants Hook, Hardwick and Mason &

Hanger may not assert the defense of qualified immunity because they are private, rather than government, defendants. Plaintiff's argument is well-taken. The United States Supreme Court has rejected the concept of derivative immunity, Dennis v. Sparks, 449 U.S. 24, 29 (1980). Therefore, the private defendants may only assert the defense of qualified immunity if they are entitled to such a defense in their own right, rather than because they are alleged to have conspired with immune officials.

In Downs v. Sawtelle, 574 F.2d 1 (1st Cir.), cert. denied, 439 U.S. 910 (1978), a deaf mute sued under 42 U.S.C. § 1983, alleging a conspiracy between the plaintiff's sister and spendthrift guardian, a physician, and three social workers for sterilizing her against her will and removing her child from her custody. The court held that although the public officials might be protected by qualified immunity, the defense was not available to plaintiff's sister. The court reasoned that although qualified immunity for public officials was an integral part of the background of tort liability against which section 1983 was to be read, such immunity was not historically accorded to private individuals. Id. at 15. See also Howerton v. Gabica, 708 F.2d 380, 385 n. 10 (9th Cir. 1983). The Downs court also determined that the policies underlying qualified immunity for public officials did not support an extension of that immunity to private individuals:

> To place this court's imprimatur upon an immunity in favor of a private individual could in many instances work to eviscerate the fragile protection of individual liberties

> afforded by the statute. Private parties simply are not confronted with the pressures of office, the often split-second decisionmaking or the constant threat of liability facing police officers, governors and other public officials. Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights.

Downs v. Sawtelle, supra, at 15-16. This court agrees with the reasoning of the First Circuit Court of Appeals, and declines to extend the defense of qualified immunity to defendants Hook, Hardwick and Mason & Hanger in this case. Defendants' motion for summary judgment will, therefore, be granted as to the remaining DOE and LANL defendants insofar as the claims against them seek money damages, denied insofar as plaintiff seeks declaratory and injunctive relief, and denied as to defendants Hook, Hardwick and Mason & Hanger.

II. Plaintiff's Motion for Relief Pursuant to Rule 56 (f)

Plaintiff urges this court to order a continuance before ruling on defendants' Supplemental Motion for Summary Judgment on the issue of qualified immunity, pursuant to Fed. R. Civ. P. 56(f). Plaintiff argues that he should be entitled to conduct discovery to discredit the alleged subjective intentions of the defendants. This court has already ruled that the subjective intentions of the defendants are irrelevant to the availability of qualified immunity as a defense. See Part I, supra.

Plaintiff's motion for relief pursuant to Rule 56(f) is, therefore, without merit and will be denied.

III. Plaintiff's Motion to Compel Production of Documents and Defendants' Renewed Motion for a Protective Order

Plaintiff requests this court for an order compelling the defendants to produce the documents sought in his Supplemental Request for Production. Defendants, however, request this court to stay all discovery in this action pending "final resolution" of the issue of qualified immunity. At the end of October, 1984, plaintiff served a request for production of documents on defendants. Defendants filed a motion for protective order in November, 1984, based on the pendency of their motions for dismissal or summary judgment, and the doctrine of qualified immunity. On May 7, 1985, this court granted defendants' motion and entered an order staying all discovery in this action, because of the pendency of potentially dispositive issues of interpretation of law and good faith immunity. In April, 1986, plaintiff served a copy of his Request for Production of Documents on defendants on defendants. Plaintiff now argues that the dispositive issues have been ruled on by this court, and that none of the defendants have responded to his Request for Production of Documents. He urges this court to issue an order compelling all defendants to produce the documents he seeks. Defendants, however, have announced their intention to appeal the denial of qualified immunity, and request this court to stay all discovery until this question is finally resolved.

The United States Supreme Court has articulated the principle behind staying discovery pending resolution of the availability of the defense of qualified immunity: "Harlow emphasizes that even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" Mitchell v. Forsyth, 53 U.S.L.W. 4798, 4802 (U.S. June 19, 1985) (quoting Harlow v. Fitzgerald, supra, at 817). In this case, however, the principles justifying a stay of discovery do not apply. As discussed above, see Part I, supra, qualified immunity does not apply to claims for declaratory or prospective injunctive relief. Among the various claims for relief in this case, plaintiff seeks an injunction requiring Mason & Hanger to process his application for employment and to hire him if he passes the proper criteria for a security inspector. Defendants' defense of qualified immunity does not apply to this claim. There is, therefore, no reason to stay discovery pending resolution of the claim of qualified immunity. Defendants' motion for a protective order is, therefore, not well taken and will be denied. Plaintiff's motion to compel production of documents will not, however, be granted. Defendants shall either produce the documents requested or present proper objections to the discovery sought by plaintiff.

Now, Therefore,

IT IS BY THE COURT ORDERED THAT defendants' supplemental motion for summary judgment on the issue of qualified immunity is granted as to the remaining DOE and LANL defendants, insofar as

plaintiff seeks money damages and denied insofar as plaintiff seeks declaratory or injunctive relief. Defendants' supplemental motion for summary judgment is denied as to defendants Hook, Hardwick and Mason & Hanger. Plaintiff's motion for relief pursuant to Rule 56(f) is denied.

IT IS FURTHER ORDERED that plaintiff's motion to compel production of documents is well-taken and will be granted insofar as defendants must either produce the documents requested by plaintiff, or tender proper objections to the discovery sought. Defendants' renewed motion for a protective order will be denied.

s/s

Chief Judge

[Filed October 21, 1986]

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALFREDO DEVARGAS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 86-1894
	)	
MASON & HANGER-SILAS MASON CO., INC.; T.R. Hook, Individually and in his official capacity; DON HARDWICK, Individually and in his official capacity,	)	
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
JOHN DOES, Individually and in their official capacities, LOS ALAMOS NATIONAL LABORATORY; RICHARD ONE THROUGH TWO, Individually and in their official capacities;	)	

UNIVERSITY OF CALIFORNIA; ROBERT POGNA, Employee Los Alamos National Laboratory,

Defendants.

ALFREDO DEVARGAS,

Plaintiff-Appellee,

v. No. 86-2843

MASON & HANGER-SILAS MASON CO., INC.; T.R. HOOK, Individually and in his official capacity; DON HARDWICK, Individually and in his official capacity,

Defendants-Appellants,

and

THE UNITED STATES DEPARTMENT OF ENERGY; JOHN DOES, Individually and in their official capacities; LOS ALAMOS NATIONAL LABORATORY; RICHARD ONE THROUGH TWO, Individually and in their official capacities;

GARY GRANERE, Acting Area Manager-Department of Energy Los Alamos Area Office; UNIVERSITY OF CALIFORNIA; DONALD KERR, Director, Los Alamos National Laboratory; ED. C. WALTERSCHEID, Employee Los Aiamos National Laboratory; JOHN S. HERRINGTON; ROBERT POGNA, Employee Los Alamos National Laboratory,	)
Defendants.	)

Appeal from the United States District Court
for the District of New Mexico
(D.C. Civ. No. 83-1674 HB)

Joseph E. Earnest of Montgomery & Andrews, Santa Fe, New Mexico (Laurie A. Vogel of Cherpelis & Associates, Albuquerque, New Mexico, with him on the briefs) for Defendants-Appellants.

Steven G. Farber, Santa Fe, New Mexico (Richard Rosenstock, Chama, New Mexico, and Philip Davis, Albuquerque, New Mexico, with him on the briefs) for Plaintiff-Appellee.

Before LOGAN, MOORE, and TACHA, Circuit Judges.

LOGAN, Circuit Judge.

Alfredo DeVargas has vision in only one eye. In 1981 and again in 1983 he applied to be a security inspector with defendant Mason & Hanger-Silas Mason Co., Inc. (Mason & Hanger). Mason & Hanger, a private corporation, provides security inspectors for the Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico, pursuant to a subcontract with the Regents of the University of California (Regents). LANL operates under an agreement between the United States Department of Energy (DOE) and Regents. Mason & Hanger, through employee defendants T.R. Hook and Don Hardwick, refused to process DeVargas' application for employment, relying upon a then-applicable DOE regulation, Interim Management Directive No. 6102 Appendix IV (IMD 6102), which provided that "[a] one-eyed individual shall be medically disqualified for security inspector duties." Id. A 6 b (8), II R. Tab 65B-1 at 11.

In 1984, DeVargas brought suit under both 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971), against private defendants Mason & Hanger, Hook, and Hardwick; DeVargas asserted similar claims against public defendants LANL, DOE, Regents and several of their employees. DeVargas alleged that the refusal to hire him violated his civil rights; he sought damages, injunctive, and declaratory relief. The crux of his claims was that IMD 6102 was either unconstitutional or improperly interpreted by defendants.

The district court ruled that the individual government employee defendants were entitled to qualified immunity against DeVargas' claims for monetary damages, and it granted summary judgment in their favor.[1] The district court denied the qualified immunity defense of the private defendants, however, ruling as a matter of law that private parties were not entitled to this defense. The private defendants, relying upon Mitchell v. Forsyth, 472 U.S. 511 (1985), now seek interlocutory review of this denial of qualified immunity.

In considering this appeal, we must first address three jurisdictional issues: (1) whether these private parties claiming qualified immunity have a right to interlocutory appeal; and (2) whether DeVargas' joinder of a claim for injunctive and declaratory relief prevents this interlocutory appeal; and (3) whether the presence of allegedly disputed material facts relating to the qualified immunity claim prevents the appeal. Because we conclude that we have jurisdiction, we also address the merits, holding that private parties acting in accord with duties imposed by a contract with a governmental body are entitled to raise the defense of qualified immunity, and that the district court should have granted the private defendants qualifed immunity in this case.

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[1] The district court earlier dismissed claims against Regents and LANL on the ground that they were entitled to immunity under the Eleventh Amendment. It also dismissed, on the ground of federal soverign immunity, the damages claims against DOE and those DOE officials sued in their official capacities. The claims against fictitious defendants were struck with the parties' consent. These district court rulings are not now before us on appeal.

I

Although the general rule is that a federal appellate court will not review district court orders before the entire litigation is concluded, see 28 U.S.C. § 1291, this "final judgment" rule has several exceptions. The key exception applicable in this case is the independent collateral order doctrine, pronounced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, (1949). The Supreme Court, in Mitchell v. Forsyth, 472 U.S. 511 (1985), held that the collateral order exception allows an interlocutory appeal of the denial of a defense of qualified immunity when a public official is sued for damages and the relevant facts underlying the qualified immunity defense are undisputed.

A

The Supreme Court has not addressed qualified immunity defenses raised by private parties; it has addressed only public officials' right to qualified immunity. See Mitchell, 472 U.S. at 511 (former U.S. Attorney General); Anderson v. Creighton, 55 U.S.L.W. 5092 (U.S. June 25, 1987) (FBI agent); Malley v. Briggs, 475 U.S. 335 (1986) (police officer); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (White House aides); see also Nixon v. Fitzgerald, 457 U.S. 731 (1982) (claim of absolute immunity by former President of the United States). The jurisdictional issue which we address now is not whether private parties may claim qualified immunity; the question is rather, assuming the validity of such a defense, whether a private party has the same right as a

government employee to bring an interlocutory appeal from the denial of such a defense. See Segni v. Commerce Office of Spain, 816 F.2d 344, 346 (7th Cir. 1987).

The case before us is not one in which a private party allegedly conspired with a public official to act outside the official's scope of authority. See Chicago & North Western Transport Co. v. Ulery, 787 F.2d 1239, 1241 & n.1 (8th Cir. 1986) (denying private party right of interlocutory appeal). But see Myers v. Morris, 810 F.2d 1437, 1441 (8th Cir.) (allowing private party to bring interlocutory appeal of denial of qualified immunity in concert with public officials appealing same issue), cert. denied, 108 S. Ct. 97 (1987). Rather, the private parties are a government contractor and its employees, and their defense to the claim of wrongful conduct is that they were performing the government contract according to its terms. Essentially, they argue, the government made them do it.

We hold that private parties acting pursuant to contractual duties may bring interlocutory appeals from the denial of qualified immunity. Cf. Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676, 684-85 & n.7 (5th Cir. 1985) (court had jurisdiction to hear appeal from order denying absolute immunity by registered national securities association which performed regulatory function). The Court's concern in Mitchell with encouraging efficient performance of public duties holds equally true in the situation before us. Forcing such private contractor parties to defend meritless damages actions at trial creates the same distractions from public duties as it

does for public employees. Just as qualified individuals may be deterred from public service if they are subjected to the cost and disruption of defending claims to which they are immune, so too might qualified private contractors be deterred from entering into contracts with government bodies. See Mitchell, 472 U.S. at 526 (quoting Harlow, 457 U.S. at 816).

B

DeVargas sought injunctive and declaratory relief, in addition to damages, from the private defendants. Mitchell expressly left open whether a defendant may immediately appeal the denial of the defense of qualified immunity to damages claims when a claim for injunctive relief remains pending in the trial court and will be tried regardless of the appeal's outcome. 472 U.S. at 519 n.5. This question has split the courts of appeal. Compare Bever v. Gilbertson, 724 F.2d 1083, 1086-87 (4th Cir.) (not appealable), cert. denied, 469 U.S. 948 (1984); Riley v. Wainwright, 810 F.2d 1006, 1007 (11th Cir. 1987) (per curiam) (presence of claim for injunctive relief alternative ground for denying appeal) with Scott v. Lacy, 811 F.2d 1153 (7th Cir. 1987) (per curiam) (appealable); Kennedy v. City of Cleveland, 797 F.2d 297, 306 (6th Cir. 1986) (same), cert. denied, 107 S. Ct. 1334 (1987); De Abadia v. Izquierdo Mora, 792 F. 2d 1187 (1st Cir. 1986) (same); Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984) (same). See also Note, Qualified Immunity and Interlocutory Appeal: Is the Protection Lost When Legal and Equitable Claims are Joined?, 87 Colum. L. Rev. 161 (1987) (supporting immediate appealability); cf. Musso v. Hourigan, 836 F.2d 736, 742 n.1 (2d Cir. 1988) (allowing appeal of

qualified immunity defense on one claim for damages although defendant faced potential damages liability on second claim still pending in trial court); Brown v. Texas A&M University, 804 F.2d 327, 332 (5th Cir. 1986) (same).

The basic premise of the minority view is that because resolution of the qualified immunity issue does not affect a claim for injunctive relief, and the defendant must stand trial anyway, the policies served by interlocutory appeal are not present. As the Fourth Circuit stated in Bever:

> "Whether or not [defendants] are immune from damages against them in their individual capacities, the litigation will demand their time and attention. A present declaration of immunity from damages claims cannot avoid the diversion of their attention from official duties which the litigation will occasion.
>
> . . . .
>
> In these circumstances, the question whether a denial of the immunity claims is appealable would appear to have little effect upon the willingness of responsible persons to serve in public office."

724 F.2d at 1087.

We believe the Bever court is mistaken. An action for injunctive relief no matter how it is phrased is against a defendant in official capacity only; plaintiff seeks to change the behavior of the governmental entity. Scott, 811 F.2d at 1153-54. Suits against public bodies or official-capacity governmental employees will be defended by government lawyers at no cost to the defendants and with no risk of personal monetary loss. In contrast, an action for damages is against the defendant individually, and if successful will result in personal liability. "[T]he fear of begin sued and held personally liable for damages is a far cry from a suit for reinstatement or injunctive relief, which public officials face regularly in the course of performing their duties." Bever, 724 F.2d at 1091 n.4 (Hall, J., dissenting). Further, individuals who are sued for damages may face the threat of punitive damages and likely will have to undergo the additional expense of retaining counsel. De Abadia, 792 F.2d at 1189-90; Kennedy, 797 F.2d at 306; Tubesing, 742 F.2d at 404 n.3. This personal liability will deter qualified individuals or business entities from performing work for the government in a way that threats of injunctive relief will not. See Harlow, 457 U.S. at 814, De Abadia, 792 F. 2d at 1190.

Moreover, if a request for injunctive or declaratory relief would prevent an appeal of denials of immunity, plaintiffs would be greatly tempted to join such claims in nearly every action. See Bever, 742 F.2d at 1091 (Hall, J., dissenting); Scott, 811 F.2d at 1154; De Abadia, 792 F.2d at 1190. We believe the policies behind permitting the appeal of a denial of a qualified immunity defense should not be so easily defeated. We therefore adopt the majority view and hold that a pending claim for injunctive relief does not bar our jurisdiction over an interlocutory appeal of a denial of a defense of qualified immunity to a damages claim.

C

DeVargas makes factual assertions which, he alleges, are material and should prevent defendants from appealing. In Mitchell, the Supreme Court allowed interlocutory appeal of a case presenting no factual disputes. The Court emphasized that "the appealable issue is purely a legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." 472 U.S. at 528 n.9.

Later Supreme Court cases have broadened appealability, holding that a court must look at a qualified immunity claim in the context of the particular facts of the case. In Anderson v. Creighton, 55 U.S.L.W. 5092 (U.S. June 25, 1987), the Court held that a plaintiff could not establish a "clearly established right" merely by pleading it in general terms, and that the court should examine the "information possessed" by the officials sued to see if a reasonable defendant could have believed his alleged acts to be lawful, in light of clearly established law. Id. at 5093. The court concluded:

> "The relevant question in this case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."

Id. at 5093. See also Malley v. Briggs, 475 U.S. 335, 345 (1986) (police officers applying for arrest warrants

are immune if a reasonable officer could have believed probable cause existed to support application).

We believe this command that lower courts apply a fact-specific review, when defendants raise before trial a qualified immunity defense, requires more than the court's judgment whether the facts as pleaded would justify a reasonable person taking the allegedly unlawful actions. In this respect we agree with the Eighth Circuit which holds that a court of appeals should consider in the light most favorable to the plaintiff all undisputed facts discernible from the pleadings and other materials submitted to supplement them by the time the motion for summary judgment is made.[2] Trapnell v. Ralston, 819 F.2d 182, 184 n.1 (8th Cir. 1987). See also Green v. Carlson, 826 F.2d 647, 650-52 (7th Cir. 1987). We disagree with the First Circuit, which considers only the facts alleged in the complaint, even if some discovery has been completed, see Bonitz v. Fair, 804 F.2d 164, 167-68 (1st Cir. 1986).[3]

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2 The court should consider all materials that are a part of the record at the time the motion for summary judgment is made. In some cases, only the pleadings are evaluated, see Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984) (plaintiffs required to meet heightened pleading standard in order to proceed to discovery), while in others, information developed by discovery is evaluated as well. See Green, 826 F.2d at 650.

3 In Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255 (1st Cir. 1987), the First Circuit elaborated upon this position. The court held that it could consider other undisputed facts in the record if the plaintiff had not alleged facts sufficient to determine whether defendants' actions violated clearly established law. Id. at 1259-60. See also Vasquez Rios v. Hernandez Colon, 819 F.2d 319, 321-23 (1st Cir. 1987) (looking to additional facts in record because plaintiffs' conclusory allegations were not sufficient for court to make reasoned finding on qualified immunity defense).

If defendants challenge the complaint by a motion for summary judgment supported by evidence controverting plaintiff's allegations, the court must consider, as it does with respect to any summary judgment motion, whether plaintiff's counteraffidavits or other evidence demonstrate a triable conflict on facts material to defendants' defense. See Kennedy, 797 F.2d at 299-300; see also Mitchell, 472 U.S. at 526 ("Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.") Indeed, in pro se prisoner cases we believe that the court may require what we call a Martinez report, see Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978) (en banc), to determine if a trial is justified. See generally Gee v. Estes, 829 F.2d 1005, 1007 (10th Cir. 1987) (per curiam).

The Supreme Court's approval of an interlocutory appeal in a fact-specific case like Anderson, in which the district court denied a pretrial qualified immunity defense motion, compels us to take an appeal, we believe, in all cases in which the denial is grounded upon a finding that disputed material facts exist in the case. Our task in such an appeal is not to determine liability on a battle of affidavits, but to determine whether, on the basis of the pretrial record, there exists a conflict sufficiently material to defendants' claim of immunity to require them to stand trial. See, e.g., Garrett v. Rader, 831 F.2d 202 (10th Cir. 1987) (ruling against defendant on qualified immunity appeal and remanding for trial).

Wright v. Southern Arkansas Regional Health Center, Inc., 800 F.2d 199 (8th Cir. 1986), illustrates the problem and the proper resolution. In Wright, plaintiff sued his health center employer, alleging that the employer violated his First Amendment rights by firing him in political retaliation. The constitutional right at issue was clearly established; what the parties disputed on interlocutory appeal, which the Eighth Circuit allowed, was whether sufficient evidence supported the claim that defendant's acts were improperly motivated. The court phrased the qualified immunity question as follows:

> "To put it in terms of the present case, the issue is not whether defendant was improperly motivated in fact, but, rather, when all the facts are viewed in the light most favorable to plaintiff, there is any genuine issue, triable to a jury, of improper motivation."

Id. at 203. See also Chinchello v. Fenton, 805 F.2d 126, 130-32 (3d Cir. 1986) (accepting interlocutory appeal of denial of qualified immunity despite presence of factual disputes).[4]

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[4] Several other circuits have accepted appeals from the denials of qualified immunity defenses despite the presence of factual disputes. See, e.g., Whitt v. Smith, 832 F.2d 451 (7th Cir. 1987); Dominque v. Telb, 831 F.2d 673 (6th Cir. 1987); Emory v. Holmes, 824 F.2d 143 (1st Cir. 1987). Implicit in the courts' review of the merits of the defenses is the decision that the courts had jurisdiction of the appeals despite the presence of factual disputes.

No doubt some interlocutory appeals of denials of qualified immunity defenses will be frivolous, as when affidavits or depositions in evidence, if believed, clearly support factual claims of violations of established law. That some interlocutory appeals may be frivolous, however, does not affect whether we have jurisdiction. These appellants or their counsel can be sanctioned for taking a frivolous appeal. Braley v. Campbell, 832 F.2d 1504, 1510-12 (10th Cir. 1987) (en banc).

II

A

Turning to the substantive issues, we note that DeVargas alleged both § 1983 and Bivens claims. For purposes of this opinion we treat the qualified immunity defenses to both claims as identical, assuming arguendo that a Bivens action would be available against a private party defendant.[5] We further assume that the scope of qualified immunity available to a private party defendant to a Bivens action is as broad as that available to a private defendant charged with the same acts in a

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[5] We need not decide whether or when a Bivens claim may be stated against private party defendants, as we rule that these private parties could claim qualified immunity in any event. See Bothke v. Fluor Engineers & Constructors, Inc., 834 F.2d 804, 809 (9th Cir. 1987). Resolution of this issue is by no means clear.

The district court below did not address whether a Bivens claim can be made against private party "federal actors." The circuits appear split on this point. Four circuits have held that a private party federal actor may be liable in a Bivens action: Reuber v. United States, 750 F.2d 1039, 1053-57 (D.C. Cir. 1984); Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982); Yiamouyiannis v. Chemical Abstracts Serv., 521 F.2d 227, 230 (6th Cir. 1975), cert. denied, 439 U.S. 983 (1978); but compare Wagner v. Metropolitan Nashville Airport Auth., 772 F.2d 227, 230 (6th Cir. 1985) (majority opinion rejects Bivens claim on grounds plaintiff did not allege defendant was federal employee); Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1337-38 (9th Cir. 1987). One circuit has refused to allow Bivens actions against private parties; Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 932 n.8 (1st Cir.), cert. denied, 419 U.S. 1001 (1974). Three circuits have expressly left open the question of whether a Bivens claim may ever be asserted against a private party: Stevens v. Morrison-Knudsen Saudi Arabia Consortium, 576 F. Supp. 516, 520-21 (D. Md. 1983), aff'd mem., 755 F.2d 375 (4th Cir. 1985); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 75-76 (8th Cir.), cert. denied, 429 U.S. 855 (1976); Morast v. Lance, 807 F.2d 926, 930-31 (11th Cir. 1987).

§ 1983 suit.[6] We thus analyze together the defense of qualified immunity to both claims, and we reach the same result as to both.

In its ruling below, the district court denied qualified immunity to defendants Mason & Hanger, Hook, and Hardwick solely because of their status as private parties.[7] The Supreme Court in Lugar v. Edmundson Oil Co., 457 U.S. 922 (1982), raised the

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6 The cases discussing qualified immunity of government officials apply essentially the same analysis whether a § 1983 or Bivens claim is made. See Butz v. Economou, 438 U.S. 478, 500 (1978) ("no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by Bivens than is accorded state officials when sued for identical violations under § 1983"); Harlow, 457 U.S. at 818 n.30 (same qualified immunity for state and federal officials).

7 At oral agrument we expressed some concern whether the defendants were federal or state actors for purposes of a § 1983 or Bivens claim. See Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Vincent v. Trend Western Technical Corp., 828 F.2d 563, 567-68 (9th Cir. 1987); Milonas v. Williams, 691 F.2d 931, 939-40 (10th Cir.1982). The defendants do not dispute in this appeal the district court's finding that they were state actors for purposes of the § 1983 claim and federal actors for the Bivens claim. We therefore do not discuss that issue.

possibility of recognizing such a defense but expressly reserved judgment on whether private parties may claim qualified immunity.[8]

In cases in which private party defendants allegedly conspired with public officials to deny plaintiffs their constitutional rights, lower courts have denied the private parties qualified immunity. See Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983);[9] Downs v. Sawtelle, 574 F.2d 1, 15 (1st Cir.), cert. denied, 439 U.S. 910 (1978).

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8 In Lugar, the Court held that a private party who jointly participated with state officials in seizing property pursuant to a procedurally defective state statute could be sued under § 1983 as acting "under color of state law." In responding to the dissent's concern about the effect of this ruling upon private individuals who innocently rely upon seemingly valid state laws, the court noted that the problem should be dealt with not by changing the elements of a § 1983 claim, but by establishing an affirmative defense. "A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture." Id. at 942 n. 23.

9 In Howerton, the Ninth Circuit appeared to state a broad rule that private party defendants could never claim good faith immunity. "[T]here is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights." Id. at 385 n.10. In a later case, however, the court appeared to retreat from this ruling. See Thorne v. City of El Segundo, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (raising but not deciding question of whether independent contractor state actor could claim qualified immunity defense).

(1985). We conclude that when private party defendants act in accordance with the duties imposed by a contract with a governmental body, perform a governmental function, and are sued solely on the basis of those acts performed pursuant to contract,[11] qualified immunity is proper.[12]

B

DeVargas argues that if we conclude that private parties may claim immunity, we should distinguish between the individual defendants (Hook, Hardwick) and the corporate defendant (Mason & Hanger), and grant § 1983 qualified immunity only to the individuals. DeVargas bases this argument on the following syllogism:

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11 We express no opinion on the propriety of granting qualified immunity when a private contractor performing a governmental function, such as operating a prison, performs acts not required by the contract, and is sued for those acts. See Kay, The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983, 40 Vand. L. Rev. 867, 883-88 (1987) (suggesting that when private contractors violate constitutional duties in order to maximize profit, qualified immunity is improper).

12 Myers v. Morris, 810 F.2d 1437 (8th Cir.), cert. denied, 108 S. Ct. 97 (1987), although primarily discussing absolute immunity for private defendants, is similar conceptually to the case before us. In Myers, the private party defendants were appointed by a state court to provide recommendations and reports concerning child abuse proceedings pending before that court. In granting absolute immunity for quasi-judicial functions, the court noted that the private defendants had the "authority, and perhaps the duty" to perform the acts of which plaintiffs complained. Id. at 1467 (emphasis added).

(1) municipal defendants in § 1983 actions are not vicariously liable for their employees' acts, but may be liable only upon a showing that their employees acted pursuant to official policy or custom, Monell v. Department of Social Services, 436 U.S. 658, 691 (1978); (2) corporate defendants similarly are not vicariously liable under § 1983, Lusby v. T.G.&Y. Stores, Inc., 749 F.2d 1423, 1432-33 (10th Cir. 1984), cert. denied, 474 U.S. 818 (1985) (cert. petition of private defendant T.G.&Y. Stores);[13] (3) municipal defendants in § 1983 claims received no qualified immunity defense, Owen v. City of Independence, 445 U.S. 622, 638 (1980); and therefore corporate defendants to § 1983 suits likewise should not be able to claim qualified immunity.

The basic premise underlying DeVargas' argument is that because the courts have extended the principle that municipalities are not vicariously liable under § 1983 to include corporate defendants, we should similarly extend the rule that municipalities are not entitled to qualified immunity to private corporations. We reject this premise. The issue of whether parties should be held vicariously liable is completely distinct from whether parties should be entitled to qualified immunity.

The Supreme Court's holding in Monell was based on congressional intent that § 1983 liability not be imposed vicariously. See Monell, 436 U.S. at 691-92. Although Monell addressed only the liability of municipalities, the rationale of its holding applies equally to

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13 Mason & Hanger does not dispute that its conduct satisfied the Lusby test for corporate § 1983 liability. See Appellants' Brief-in-Chief at 16-17 (firm had policy, pursuant to terms of contract, of not hiring one-eyed security inspectors).

But in cases in which private party defendants received the aid of public officials, pursuant to statutes that may be unconstitutional, to attach or garnish plaintiffs' property, the courts have concluded that private party state actor defendants should not be deprived of the qualified immunity defense. See Jones v. Preuit & Mauldin, 808 F.2d 1435, 1440-42 (11th Cir. 1987), vacated in part on other grounds, 822 F.2d 998 (11th Cir. 1987), opinion vacated and rehearing granted en banc, 833 F.2d 1436 (11th Cir. 1987); Watertown Equipment Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487 (8th Cir. 1987); Buller v. Buechler, 706 F.2d 844, 850-52 (8th Cir. 1983) (private individual who relies upon unconstitutional state garnishment procedure may assert qualified immunity defense); Folsom Investment Co. v. Moore, 681 F.2d 1032, 1037-38 (5th Cir. Unit A 1982) (private party who relies on presumptively valid state attachment statute may claim qualified immunity); see also Carman v. City of Eden Prairie, 622 F. Supp. 963, 965-66 (D. Minn. 1985) (private defendant acting pursuant to state detoxification statute may claim qualified immunity defense); cf. Del's Big Saver Foods Inc. v. Carpenter Cook, Inc., 795 F.2d 1344, 1351 (7th Cir. 1986) (recognizing but declining to resolve issue); Thorne v. City of El Segundo, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (recognizing but declining to resolve issue in case involving independent contractor defendant).

In the instant case, the private party defendants are not alleged to have conspired with a government official to act beyond the boundaries of the law, or to have acted pursuant to an unconstitutional law which permits, but does not require, their conduct. Here, as the district court found, the private defendants reasonably

thought that their contract with a government body required them to act in a certain manner. The private parties' contract with LANL required Mason & Hanger to provide security forces for the laboratory, and to do so in accordance with DOE regulations, including IMI 6102.

The type of case before us presents the strongest arguments for extending qualified immunity to private party defendants. First, the governmental authority involved requires private defendants to act as they do. Indeed, were they to act otherwise they would likely be liable for breach of contract to the governmental body with whom they contracted. Not to allow immunity here places defendants between Scylla and Charybdis[10]—potentially liable either to plaintiffs for obeying the contract, or to governmental bodies for breaching it.

Second, the functions which the private parties performed pursuant to contract are functions which governmental employees would perform had the government not contracted them out. The Supreme Court instructs courts to examine the function of individual defendants—the nature of the individual responsibilities—not their status, in resolving immunity defenses. Forrester v. White, 56 U.S.L.W. 4067, 4070 (U.S. Jan. 12, 1988); Cleavinger v. Saxner, 474 U.S. 193, 201

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10 See Homer, The Odyssey, Book XII, 11.85-112; see also The Oxford Classical Dictionary, 228 (Charybdis), 968 (Scylla) (N. Hammond & H. Scullard 2d Ed. 1970).

corporate defendants. Lusby, 749 F.2d at 1433; Powell v. Shopco Laurel Co., 678 F.2d 504, 506 (4th Cir. 1982). In the area of §1983 immunities, the critical distinction is not between employer and individual defendants, but between defendants that are governmental bodies and other defendants. "[D]ifferent considerations come into play when governmental rather than personal liability is threatened." Owen, 445 U.S. at 653 n.37. When the Court has addressed immunity of government actors who may be personally liable, it has made it clear that immunity in some form is the norm. See Harlow, 457 U.S. at 818 & n.30. Similarly, we have just held generally that when private parties act pursuant to contractual duties and perform governmental functions, they can claim qualified immunity. That a private party defendant is a corporation should not change this result.

In establishing qualified immunity for public officials, the Court has emphasized policy reasons making that immunity necessary: (1) the injustice of making defendants personally liable merely for performing their duties, (2) the concern that the lack of qualified immunity would render public officials overcautious in their jobs, and (3) the difficulty of attracting qualified persons into public service were immunity not available. See Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); Harlow, 457 U.S. at 814. These reasons apply equally to all private defendants acting pursuant to contract, whether individuals or corporations. A nonimmune contractor defendant would be required to bear the total cost of plaintiff's injury, regardless of the objective

reasonableness of its acts.[14] In addition, denying immunity would make contractor defendants—whether individual or corporate—more timid in carrying out their duties and less likely to undertake government service.

In contrast, a governmental body found liable can pay the judgment from the public treasury, shifting the cost to society at large; thus denying immunity does not cause the same injustice. See Owen, 445 U.S. at 654-55 & n.39. And the liability of the municipality itself will have little chilling effect on the acts of its officers when those officers are not personally liable. Id. at 655-56.

We therefore conclude that the corporate status of Mason & Hanger should not affect its immunity. See Folsom, 681 F.2d at 1037-38 (allowing immunity to private insurance corporations); Watertown Equipment Co., 830 F.2d at 1490 (corporate defendant entitled to claim qualified immunity defense); see also Jones, 808 F.2d at 1440-42 (private partnership may invoke qualified immunity defense).

III

The district court denied qualified immunity to defendants Hook, Hardwick and Mason & Hanger solely on the basis of their private status, and granted

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[14] DeVargas argues that this cost rationale should have little effect here, as Mason & Hanger's defense and litigation costs may ultimately be paid by DOE as expenses. Even if Mason & Hanger will ultimately bear no costs here, however, the fact remains that DOE will only reimburse Mason & Hanger and therefore that Mason & Hanger must pay some costs up front. Bearing this cost imposes a burden on Mason & Hanger, and may discourage it and other private corporations from entering government contracts in the future.

qualified immunity for all public employee defendants. Since we conclude that these private defendants may claim qualified immunity, we must next ask whether they are entitled to immunity on the facts before us.

In reviewing appeals of denials of qualified immunity, our primary concern is not whether defendants violated plaintiffs' rights, but whether defendants "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. If the law was not clearly established at the time defendants acted, they are entitled to qualified immunity. Id.; Mitchell, 472 U.S. at 524. The test of what law is clearly established "should be determined in a particularized sense." Garrett v. Rader, 831 F.2d 202, 204 (10th Cir. 1987); Anderson, 55 U.S.L.W. at 5093. This test requires "some but not precise factual correspondence" between precedent establishing law and the case on review, and demands that defendants apply "general, well developed legal principles." Garcia v. Miera, 817 F.2d 650, 657 (10th Cir. 1987) quoting People of Three Mile Island v. Nuclear Regulatory Commission, 747 F.2d 139, 144 (3d Cir. 1984).

DeVargas presents not material fact questions,[15] but two basic theories of liability for handicap discrimination, one based upon a reading of IMD 6102, and the other on a constitutional violation if defendants' interpretation of IMD 6102 is correct.[16] Under the foregoing test, neither of plaintiff's theories establishes a violation of a "clearly established right" of which a reasonable defendant would be aware.

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15 DeVargas asserts the existence of two questions of material fact that would preclude a grant of immunity. The first question which DeVargas styles as "factual" concerns the proper meaning and interpretation of IMD 6102. Since IMD 6102 is a federal regulation, its interpretation is a question of law, not of fact. Hoover & Bracken Energies, Inc. v. United States Department of Interior, 723 F.2d 1488, 1489 (10th Cir. 1983), cert. denied, 469 U.S. 821 (1984). The second question is whether defendants' reliance on their interpretation of IMD 6102 to deny DeVargas employment was reasonable. See infra note 22. Although the reasonableness of this reliance presents a factual dispute, this dispute is not material in light of our conclusion, infra, slip op. at 24-25, that any right which DeVargas claims was not clearly established at the time defendants acted.

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16 DeVargas does not assert on appeal, and we do not address, his earlier claim that defendants' conduct violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The district court granted summary judgment against DeVargas on his § 504 claims, finding Mason & Hanger not a recipient of "federal financial assistance," a necessary element of such claims.

A

DeVargas' first theory asserts that IMD 6102, as a federal regulation, gave him the right to a physician's review of his disqualification for having sight in only one eye. DeVargas argues that because IMD 6102 A 3 e[17] requires a "designated physician" to determine whether an examinee meets the medical qualification standards, defendants erred in not having a physician determine his disqualification under IMD 6102 A 6 b (8) for being one-eyed. DeVargas claims defendants compounded this initial error because no designated physician reviewed DeVargas' initial disqualification under IMD 6102 A 6 c.[18] He asserts that these errors constitute a § 1983 violation.

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17 IMD 6102 A 3 e provides: "The ascertainment as to whether or not the examinee meets the medical standards of this part shall be made by a designated physician." II R. tab 65B-1 at 3.

18 IMD 6102 A 6 c provides: "Despite an initial indication of medical disqualification, examinees may be considered for medical qualification when, in the judgment of the designated physician, a thorough history, supplemental physical examination and other appropriate laboratory test [sic] and medical investigative procedures indicate that the examinee can safely and effectively perform all normal and emergency job duties; and provided that the designated physician determines that all such duties are within the physical capability and exercise tolerance of the examinee. The designated physician shall notify the cognizant field office management authority of, and document the basis for, such determinations at the time they were made."

II R. tab 65B-1 at 12-13.

We do not decide whether DeVargas' rights under IMD 6102 were violated or indeed whether IMD 6102 can provide the basis for a § 1983 claim,[19] for any rights DeVargas had under IMD 6102 to physician review were not clearly established. First, DeVargas has not identified any authoritative interpretation of IMD 6102 extant when he applied for employment. In addition, while IMD 6102 A 3 e appears to require a physician to make all medical qualification decisions, such a requirement makes sense only with regard to those medical disqualifications under IMD 6102 A 6 b which require the physician's judgment to determine their presence,[20]

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19 In at least some instances, violations of rights provided under federal regulations provide a basis for § 1983 suits. Wright v. City of Roanoke Redevelopment & Housing Auth., 55 U.S.L.W. 4119, 4122 (U.S. Jan. 14, 1987); Samuels v. District of Columbia, 770 F.2d 184, 199-201 (D.C. Cir. 1985). We need not now decide whether violation of the regulation here in question allows for suit under § 1983, as we hold defendants can claim qualified immunity from damages. See Gholston v. Housing Auth. of City of Montgomery, 818 F.2d 776, 780-81 (11th Cir. 1987) (avoiding question of whether regulation under review could form basis for § 1983 suit).

20 See, e.g., IMD 6102 A 6 b (1) (respiratory disabilities); IMD 6102 A 6 b (2) (b) (cardiovascular disabilities); IMD 6102 A 6 b (3) (a) (endocrine, nutritional or metabolic disabilities); IMD 6102 A 6 b (5) (hematopoietic disorders); IMD 6102 A 6 b (6) (malignant neoplasms).

or require a review of medical history or diagnosis.[21] In contrast, IMD 6102 A 6 b (8) does not refer to medical judgment, review of history, or diagnosis, but states a mandatory disqualification. Thus, whether a physician must confirm what DeVargas already knew and fully disclosed—his monocular condition—when the presence of that condition is a mandatory disqualification for security inspector, was not "clearly established" at the time defendants acted.[22]

Finally, DeVargas has no right to physician review under IMD 6102 A 6 c, as that section allows physician review, but does not require it.

B

DeVargas' second argument is that if defendants' reading of IMD 6102—that it prohibits hiring one-eyed security inspectors—is correct, the regulation violates clearly established equal protection rights of the handicapped. This argument also lacks merit. Since the handicapped are not a suspect class for equal protection analysis, Brown v. Sibley, 650 F.2d 760, 765-66 (5th Cir. Unit A 1981), and DeVargas has no fundamental

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21 See, e.g., IMD 6102 A 6 b (7) (neurological disorders); IMD 6102 A 6 b (9) (mental or emotional disorders).

22 Also relevant, as the district court noted, was the fact that defendants did not rely on their own interpretation of IMD 6102 A 6 b (8) as a mandatory disqualification, but sought the opinion of other individuals at Mason & Hanger and LANL, including an attorney for LANL. All of these individuals likewise saw A 6 b (8) as mandatory and disqualifying.

constitutional right to government employment, Coleman v. Darden, 595 F.2d 533, 538 (10th Cir.), cert. denied, 444 U.S. 927 (1979), IMD 6102 violates equal protection only if it is not rationally related to the goals of DOE, which promulgated it. Plaintiff points to no decision that IMD 6102 or a similar rule lacks rational basis. Indeed, DOE's and Congress' concern with protecting the classified and nuclear material at LANL, see Transcript of Proceedings Before the Subcommittee on Procurement & Military Nuclear Systems of the Committee on Armed Services of the United States House of Representatives, III R. tab 65C at 17-18, 23-25 (dialogue between Congressman Daniel and Thomas R. Clark, Deputy Manager, Albuquerque Operations Office, DOE), together with the logical inference that a fully sighted person may perform those security functions more capably than an individual only partially sighted, go far to show such rational basis. At any rate, neither IMD 6102's disqualification of one-eyed persons nor defendants' enforcement of IMD 6102 violates clearly established equal protection rights. Defendants therefore are entitled to qualified immunity.[23]

In summary, we accept jurisdiction of this appeal, REVERSE the district court's denial of qualified immunity for private defendants Hook, Harwick, and Mason & Hanger, and REMAND for trial on such equitable claims as remain before the district court.

[Filed April 7, 1988]

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[23]DeVargas also argues in his brief that section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, and regulations enacted pursuant thereto, establish a duty, or at least a strong congressional policy, for government contractors to hire the handicapped. To the extent DeVargas argues violation of a § 503 duty, we reject the theory because it was not raised in his complaint before the district court. To the extent he argues that § 503 shows congressional policy to hire the handicapped, such a policy statement cannot constitute a "clearly established rule of law," the violation of which would foreclose immunity.

§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

(a) Promulgation of rules and regulations

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity)

to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers; exception

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

UNITED STATES DEPARTMENT OF ENERGY
INTERIM MANAGEMENT DIRECTIVE NO. 6102
JANUARY 31, 1978

APPENDIX PART IV

PROTECTIVE PERSONNEL

A. Medical Qualification Standards

1. Applicability. This part provides the minimum medical qualifications, criteria, and guides to be used by designated physicians in advising responsible DOE officials whether the medical and physical condition of protective personnel (except DOE couriers) employed by, or prospective protective personnel to be employed by, DOE or DOE contractors reasonably assures that they can effectively perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site, and the general public.

2. General Definitions

a. Medical Condition and Medical Requirements

As used in these standards, the term "medical condition" includes general health, physical condition, emotional and mental stability, and mental health. The term "medical requirements" embraces all of these areas.

b. Shall, Should, and May

The word "shall" is used to denote a requirement, the word "should" to denote a recommendation, and the word "may" to denote permission. In order to conform to these standards, protective personnel staff selection and maintenance shall be performed in accordance with the requirements, but not necessarily with the recommendations or guides.

c. Designated Physician

An occupational medical physician who is designated and recommended by the local DOE field office and authorized by the Medical Director, Office of Operational and Enviromental Safety, Headquarters, to determine the medical and physical condition of protective personnel. When an occupational medical physician is not available, physicians who are not board-qualified in occupational medicine may be recommended and authorized as designated physicians for the purpose of this part. Designated physicians need not be employed full-time, but shall be contractually responsible to DOE for performance of the medical functions required by this part.

d. Contractor

As used in this part, the term "contractor" includes subcontractors.

e. Security Inspector

A uniformed individual who is authorized under Section 161.k. of the Atomic Energy Act of 1954, as amended, or other appropriate statutory authority to carry firearms and who is employed for, and charged with, the protection of classisfied matter, special nuclear material, or other Government property.

f. Guard

An individual, not necessarily uniformed, who is employed for, and charged with, the protection of

classified matter or Government property. Guards shall be armed with nonlethal weapons such as a billy-club, "Stun-Gun", or aerosol irritants.

g. Waiver of Medical or Physical Fitness Requirements

A determination by the cognizant field office management authority, with the advice and concurrence of a designated physician, that a security inspector or guard may be retained in an active status for the effective performance of normal and emergency duties within the limitations recommended by the designated physician and approved by the cognizant field office management authority.

3. Application of Medical Qualification Standards

a. The standards of this part are the minimum necessary to determine the medical and physical capability of protective personnel to perform all normal and emergency duties effectively and safely. Protective personnel must be mentally alert and capable of exercising good judgment, implementing instructions, and assimilating necessary specialized training. Protective personnel shall be capable of reading post orders and comprehending orders written or spoken in English. Emotional and mental stability is essential for the effective performance of security inspector and guard duties. Security inspector duties routinely require contact with the public and the carrying of firearms and, under emergency situations, may

involve long working periods without relief, absence of detectable neurotic or psychotic conditions which would adversely affect a security inspector's ability to handle firearms safely or to act safely and effectively in emergency conditions is a necessity.

b. Security inspector applicants shall meet the standards of this part prior to assignment to security inspector duties.

c. Incumbent security inspectors shall meet the standards of this part annually or shall be relieved of security inspector duties, subject to the provisions of paragraph A.8., below.

d. Employees assigned to guard duties shall meet the standards of this part prior to assignment to guard duties and biennially thereafter, subject to the provisions of paragraph A.11., below.

e. The ascertainment as to whether or not the examinee meets the medical standards of this part shall be made by a designated physician.

f. The ascertainment as to whether or not the examinee meets the physical fitness standards of this part shall be made by a designated management supervisory official subject to the prior advice of a designated physician.

g. These medical standards allow the designated physician to exercise considerable freedom of clinical judgment in ascertaining the medical qualification of protective personnel who may have

certain kinds of medical or physical deficiencies. The designated physician may medically certify such individuals for duties without limitation after a determination is made of the individual's ability to safely and effectively perform all normal and emergency duties. This determination may require special medical evaluations or practical performance tests to demonstrate the examinee's performance abilities. When such determinations are contingent upon performance tests, the judgment of adequacy of performance shall be made by designated line supervisory authorities, or the designated physican, as appropriate.

h. For those facilities where it is necessary to determine the medical qualification of security inspectors or security inspector applicants to perform special assignment security inspector duties which might require exposure to unusually high levels of stress or physical exertion, field office managers may develop more stringent medical qualification requirements or additional medical or physical tests as necessary for such determinations. All such additional qualification requirements shall be forwarded, with justification, for the concurrence of the Director, Safeguards and Security, Headquarters, prior to application.

i. The provisions of former ERDA appendix 0528-A, part I should be applied for return to work after recovery from a temporarily disqualifying medical or surgical condition.

4. Administrative Procedures and Requirements

a. Medical Confidentiality and Retention of Medical Reports

(1) The medical information and data on each employee or applicant shall be maintained as confidential, privileged medical information and shall not be released by the designated physician without the written consent and release of the employee or applicant, except as permitted or required by law.

(2) When an individual has been examined by a designated physician, all available history and test results should be retained by the responsible DOE or DOE contractor medical department, in accordance with former ERDA appendix 0230, whether or not the candidate completes the examination, and whether or not potentially disqualifying defects are recorded.

(3) The design of forms used for medical evaluation by a local facility shall remain the responsibility and prerogative of the facility.

b. Change of Health Status of Protective Personnel

(1) It is the specific responsibility of a protective personnel employee to report immediately to his/her supervisor any known or suspected change in his/her health which might impair his/her capacity for duty or the safe and effective conduct of assigned job tasks.

(2) Supervisory personnel have the responsibility to make a timely report to the designated physician on any behavorial or health changes or deterioration in work performance that is observed in protective personnel under their jurisdiction. Examples of areas that may indicate medical or emotional problems include: incidents of ineptness, poor judgment, lack of physical or emotional stamina, social incompatibility, absence, lateness, and a tendency to become accident prone.

(3) Potential psychological or medical conditions that could impair judgment or ability to perform assigned duties safely and effectively are more amenable to early detection, diagnosis, and treatment when referred early to the designated physican for evaluation.

c. Use of Prosthetic Devices

(1) When the use of prosthetic devices, such as eyeglasses and hearing aids, is required to enable an examinee to successfully meet medical qualification requirements, a determination shall be made by a designated line supervisory authority that the use of all such devices is compatible with all emergency and protective equipment that the examinee may be required to wear or use.

(2) It is incumbent upon cognizant field office management authority to exert all reasonable and practicable effort to accommodate required emergency and protective equipment to the use of prosthetic devices, including the provision of equally effective alternate equipment if such is available.

(3) If eyeglasses are used, they shall be of the safety glass type.

5. Security Inspector Medical Qualification

a. General Qualifications

The examinee shall possess mental, sensorial, and motor skills consistent with his/her assigned duties, viz:

(1) Mental alertness and reliable judgment.

(2) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals as required by assigned job duties.

(3) Motor power, range of motion, neuromuscular coordination and dexterity as required to safely and effectively perform all assigned job duties.

b. Specific Minimum Qualifications

(1) Head, Face, Neck, Scalp

Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is a job requirement in normal or emergency operations.

(2) Nose

Ability to detect odor of products of combustion and of tracer or marker gases.

(3) Mouth and Throat

Capacity for clear speech as required for effective communication on the job.

(4) Ears

Hearing loss in the better ear not to exceed 30 db average at 500, 1000, and 2000 Hz with no level greater than 40 db in any of these frequencies (by ISO 1964 or ANSI 1969 audiometry). If a hearing aid is necessary, suitable testing procedures shall be used to assure auditory acuity equivalent to the above requirement.

(5) Eyes

(a) Distant Visual Acuity

1. Uncorrected acuity of no less than 20/200 in the better eye.

2. Corrected acuity of at least 20/30 in the better eye and 20/40 in the other eye.

3. If uncorrected distant vision in the better eye is not at least 20/40, the security inspector shall carry an extra pair of corrective lenses.

(b) Near Visual Acuity

Corrected or uncorrected vision of at least 20/40 (14/28 Snellen) in the better eye.

(c) Color Vision

Ability to distinguish red, green, and yellow. Special color vision testing and certification shall be required where fine color discrimination is critical to the safe or effective performance of assigned job tasks. On-the-job evaluation is recommended where a mild color vision defect is identified.

(d) Peripheral Vision

Field of vision in the horizontal meridian shall not be less than a total of 140^{o}.

(e) Depth Perception

Adequate depth perception as measured by stereopsis or demonstration in a practical operational test.

(6) Cardiorespiratory

(a) Respiratory

Capacity and reserve to perform physical exertion in emergencies at least equal to the demands of the job assignment, and ability to utilize respiratory protective filters and air supply masks when these are job requirements.

(b) Cardiovascular

Normal configuration and function. Capacity for exertion during emergencies. Normal resting pulse;

regular pulse. Full symmetrical pulses in extremities and neck. Normotensive, with tolerance to rapid postural changes. If, in the judgment of the designated physician, the examination reveals significant cardiac arrhythmia, murmur, enlargement, hypertension, hypotention, or other evidence of cardiovascular abnormality, a report of an evaluation by a specialist in internal medicine or cardiology may be obtained and evaluated by the designated physician.

(7) Abdomen and Viscera

No clinically significant abnormalities.

(8) Musculo-Skeletal

Normal symmetrical structure, range of motion, and power. If any impairment exists, the examinee shall demonstrate ability to complete effectively and safely all assigned duties and job tasks to the satisfaction of the supervisor.

(9) Skin

No significant abnormal intolerance to chemical, mechanical, and other physical agents. Capability to tolerate use of personal protective covering and decontamination procedures when these are required by the assigned job duties.

(10) Endocrine/Nutritional/Metabolic

Endocrine/nutritional/metabloic status adequate to

meet the stresses and demands of assigned normal and emergency job duties. Ability to accommodate to changing work schedules or to delay meals without potential incapacity.

(11) Hematopoietic

Normal function.

(12) Lymphatic

Normal.

(13) Neurological

Normal central and peripheral nervous system function.

(14) Mental and Emotional

Normal mental status. Ability to perform normal and emergency job assignments.

(15) Laboratory

(a) Hemogram

Freedom from clinically significant abnormalities of the formed elements of the blood that, in the judgment of the designated physician, could reasonably be expected to affect the safe and effective performance of assigned duties.

(b) Urinalysis

Absence of proteinuria and glycosuria unless the absence of a disqualifying systemic or genitourinary condition and the absence of significant microscopic abnormality has been demonstrated.

(c) Other Studies

Any other medical investigative procedure, including electrocardiogram and chest x-ray, which the designated physician considers necessary for adequate medical evaluation shall be conducted.

6. Security Inspector Medical Disqualification

a. Freedom from Incapacity

The examinee shall be free of the following conditions that are determined by the designated physician to be medically disqualifying for the safe and effective performance of assigned duties:

(1) Mental, emotional, or physical impairment.

(2) Medical, surgical, or other professional health treatment.

(3) Any other treatment, drugs, chemicals, diets, or agents.

(4) Any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

b. Conditions for Which Medical Disqualification Shall Normally be Mandatory

A history of any disqualifying condition shall normally be considered disqualifying unless adequate supplemental investigations and findings demonstrate that no disqualifying condition exists. Such demonstration shall include at least the specific narrative entries by the designated physician and relevant aspects of medical history, physical examination, and laboratory findings. The need for additional investigative procedures or specialty evaluation shall be determined by the designated physician. The presence of any of the following conditions normally shall disqualify the examinee:

(1) Respiratory

Significant pulmonary pathology or decrease in pulmonary function which, in the judgment of the designated physician, could interfere with the safe and effective performance of assigned duties.

(2) Cardiovascular

(a) The following conditions shall be medically disqualifying for security inspector duties:

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrythmia

7. Arterial Aneurysm

8. Significant Peripheral Vascular Insufficiency

9. Corrective Heart Surgery

10. Corrective Arterial or Great Vessel Surgery

11. Prosthetic Valve

12. Artificial Pacemaker

(b) In selected cardiovascular cases, in the judgment of the designated physician, examinees may be considered for medical qualification for security inspector duties if thorough history, physical examination, electrocardiogram, and other test procedures indicate satisfactory cardiac function and reserve sufficient to allow the examinee to safely and effectively perform all assigned job duties, both normal and emergency, provided that the designated

physician determines that all such duties and job tasks are within the physical capability and exercise tolerance of the examinee.

(3) Endocrine/Nutritional/Metabolic

(a) Any endocrine, nutritional, or metabolic condition that, in the judgment of the designated physician, would not allow the examinee to adequately meet the stresses and demands of assigned normal or emergency job duties.

(b) Inability to accommodate to changing work schedules or to delay meals without incapacity or potential incapacity.

(c) Inability to tolerate prolonged use of wearing of protective garments such as respirator masks, air masks, or bullet-resistant garments.

(d) Diabetes mellitus requiring the use of insulin. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous two years.

(e) Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency duties.

(4) Skin

Recurrent severe dermatitis or hypersensitivity to irritants or sensitizers sufficient to interfere with wearing required personal protective equipment,

or likely to be aggravated by, or interfere with, established or required decontamination procedures.

(5) Hematopoietic Dysfunction

Clinically significant hematopoietic disorders which, in the judgment of the designated physician, may be expected to interfere with the safe and effective performance of assigned job duties.

(6) Malignant Neoplasms

Malignant neoplastic disease shall medically disqualify for security inspector duties unless review of history and current medical evaluation indicate a clinical cure or remission which, in the judgment of the designated physician, renders the examinee capable of safely and effectively performing all assigned job duties, and provided that the examinee is capable of satisfying all other requirements of this standard.

(7) Neurological

(a) History of epilepsy or other convulsive disorder.

(b) History of disturbance of consciousness without satisfactory medical explanation of the cause.

(c) Any other convulsive disorder, disturbance of consciousness, or neurological disease or condition that, in the judgment of the designated

physician, may be expected to interfere with the safe and effective performance of assigned job duties.

(8) Eyes

A one-eyed individual shall be medically disqualified for security inspector duties.

(9) Mental and Emotional

An established history or clinical diagnosis of any of the following:

(a) Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability shall constitute sufficient cause for medical disqualification. A history of clinically significant emotional or behavorial problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

(b) A personality disorder that is severe enough to have manifested itself by aberrant overt acts or expressed threat of such acts.

(c) History of attempted suicide. Expressed threat or history of expressed threat of suicide.

(d) A psychosis or established history of psychosis.

(e) Alcoholism. As used in this section, "alcoholism" means a condition in which a person's

intake of alcohol is great enough to significantly damage his physical health, job performance, personal functioning, or when alcohol has become a prerequisiste to his daily functioning.

(f) Drug abuse. As used in this section, "drug abuse" means a condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

(10) Use of Medication

The use of prescribed or otherwise legally obtainable medication taken in such a dosage that, in the judgment of the designated physician, the taking or temporary delay of taking might be expected to result in unacceptable incapacity shall be medically disqualifying. For example, certain dosages or requirements for steroids, anticoagulants, antiarrhythmics, sedatives, tranquilizers, etc.

c. Determination of Medical Qualification

Despite an initial indication of medical disqualification, examinees may be considered for medical qualification when, in the judgment of the designated physician, a thorough history, supplemental physical examination, and other appropriate laboratory test and medical investigative procedures indicate that the examinee can safely and effectively perform all normal and emergency job duties; and provided that the designated physician determines that all such

duties are within the physical capability and exercise tolerance of the examinee. The designated physician shall notify the cognizant field office management authority of, and document the basis for, such determinations at the time when they are made.

7. Security Inspector Physical Fitness Qualification

Subject to a determination and written certification by a designated physician that there are no medical contraindications to participation by the examinee disclosed by a medical examination conducted within the preceding 30 days, security inspectors and security inspector applicants shall demonstrate physical fitness for security inspector duties by performance of the following exercise program within a period of 30 minutes:

a. Climb a 30- foot ladder.
b. Run 100 yards in 20 seconds and maintain functional capabilities.
c. Scale a 7-foot wall.
d. Sustain arduous activity for 3 minutes (i.e., jogging, pushups, or combinations of equally strenuous activities).
e. Pick up and carry 60 pounds for 30 feet.
f. Drag 200 pounds for 10 feet.

8. Waiver of Security Inspector Medical or Physical Fitness Standards

For special cases involving incumbent security inspectors, waivers of certain parts of the medical and physical fitness standards of this part may be

granted for certain disqualifying medical or physical deficiencies by the cognizant field office management authority, provided that:

a. The DOE field organization authority, in consultation with the designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these standards (i.e., to assure that all individuals assigned to security inspector duties are capable of safely and effectively performing all of the normal and emergency duties required by the security inspector positions to which they are assigned).

b. The employee demonstrates, by medical examination and/or practical test, as necessary, the ability to effectively and safely perform all of the routine and emergency duties that management, with the intent of accommodating the employee's deficiency, has assigned to him or her within the medical or physical limitations determined necessary by the designated physician.

c. A statement of demonstrated ability is prepared by the employee's supervisor and signed by the responsible field authority and the designated physician. The statement of demonstrated ability must clearly (1) identify the employee, (2) state the nature and degree of the specific medical or physical defect, (3) record any medical or physical job limitations

determined to be necessary by the designated physician, (4) record the satisfactory medical evaluation, and/or performance of the practical test, and (5) state the date and type of medical or practical test administered.

d. Waivers shall be revised, revalidated, and reissued at intervals not to exceed 1 year.

9. Guard Medical Qualification Standards

a. General Qualifications

The examinee shall possess mental, sensorial, and motor skills consistent with his/her assigned duties, viz:

(1) Mental alertness and reliable judgment.

(2) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals as required by assigned job duties.

(3) Motor power, range of motion, neuromuscular coordination, and dexterity as required to safely and effectively perform all assigned job duties.

b. Specific Minimum Qualifications

(1) Head, Face, Neck, and Scalp

Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is a job requirement in normal or emergency operations.

(2) Nose

Ability to detect odor of products of combustion and of tracer or marker gases.

(3) Mouth and Throat

Capacity for clear speech as required for effective communication on the job.

(4) Ears

Hearing loss not to exceed 50 db average at 500, 1000, and 2000 Hz in one ear (by ISO 1964 or ANSI 1969 audiometry). A hearing aid is permitted.

(5) Eyes

Near and distant visual acuity, with or without correction of at least 20/40 in the better eye. One-eyed individuals may qualify.

10. Guard Medical Disqualification

a. Freedom from Incapacity

The examinee shall be free of the following conditions that are determined by the designated physician to be medically disqualifying for the safe and effective performance of assigned duties:

(1) Mental, emotional, or physical impairment.

(2) Medical, surgical, or other professional health treatment.

(3) Any other treatment, drugs, chemicals, diets, or agents.

(4) Any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

b. Conditions for Which Disqualification Shall Normally be Mandatory

A history of any disqualifying condition shall be considered disqualifying unless adequate supplemental investigations and findings demonstrate that no disqualifying condition exists. Such demonstration shall include at least the specific narrative entries by the designated physician and relevant aspects of medical history, physical examination, and laboratory findings. The need for additional investigative procedures or specialty evaluation shall be determined by the designated physician. The presence of any of the following conditions normally shall disqualify the examinee:

(1) Respiratory

Significant pulmonary pathology or decrease in pulmonary function which, in the judgment of the designated physician, could interfere with the safe and effective performance of assigned duties.

(2) Cardiovascular

(a) The following conditions shall be medically disqualifying for guard duties:

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrythmia

7. Arterial Aneurysm

8. Significant Peripheral Vascular Insufficiency

(b) In selected cardiovascular cases, in the judgment of the designated physician, examinees may be considered for medical qualification for guard duties if thorough history, physical examination, electrocardiogram, and other test procedures indicate satisfactory cardiac function and reserve sufficient to allow the examinee to safely and effectively perform all assigned job duties, both normal and emergency, provided that the designated physician determines that all such duties and job tasks are within the physical capability and exercise tolerance of the examinee.

(3) Endocrine/Nutritional/Metabolic

(a) Diabetes Mellitus

Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous two years.

(b) Obesity

Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency duties.

(4) Hematopoietic Dysfunction

Clinically significant hematopoietic disorders which, in the judgment of the designated physician, may be expected to interfere with the safe and effective performance of assigned job duties.

(5) Malignant Neoplasms

Malignant neoplastic disease shall medically disqualify unless review of history and current medical evaluation indicate a clinical cure or remission which, in the judgment of the designated physician, renders the examinee capable of safely and effectively performing all assigned job duties, and provided that the examinee is capable of satisfying all other requirements of these standards.

(6) Neurological

(a) History of epilepsy or other convulsive disorder.

(b) History of disturbance of consciousness without satisfactory medical explanation of the cause.

(c) Any other convulsive disorder, disturbance of consciousness, or neurological disease or condition that, in the judgment of the designated physician, may be expected to interfere with the safe and effective performance of assigned job duties.

(7) Mental and Emotional

An established history or clinical diagnosis of any of the following:

(a) Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability shall constitute sufficient cause for medical disqualification. A history of clinically significant emotional or behavorial problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

(b) A personality disorder that is severe enough to have manifested itself by aberrant overt acts or expressed threat of such acts.

(c) History of attempted suicide. Expressed threat or history of expressed threat of suicide.

(d) A psychosis or established history of psychosis.

(e) Alcoholism. As used in this section, "alcoholism" means a condition in which a person's intake of alcohol is great enough to significantly damage his physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his daily functioning.

(f) Drug abuse. As used in this section, "drug abuse" means a condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

(8) Use of Medication

The use of prescribed or otherwise legally obtainable medication taken in such a dosage that, in the judgment of the designated physician, the taking or temporary delay of taking might be expected to result in unacceptable incapacity shall be medically disqualifying. For example, certain dosages or requirements for steroids, anticoagulants, antiarrhythmics, sedatives, tranquilizers, etc.

c. Determination of Medical Qualification

Despite an initial indication of medical disqualification, examinees may be considered for medical qualification when in the judgment of the designated physician a thorough history, supplemental physical examination, and other appropriate laboratory test and medical investigative procedures indicate that the examinee can safely and effectively perform all normal and emergency duties, and

provided that the designated physician determines that all such duties are within the physical capability and exercise tolerance of the examinee. The designated physician shall notify the cognizant field office management authority of, and document the basis for, such determinations at the time when they are made.

11. Waiver of Guard Medical Standards

For special cases involving guards, waivers of certain parts of the medical standards of this part may be granted for certain disqualifying medical or physical deficiencies by the cognizant field office management authority provided that:

a. The DOE field organization authority, in consultation with the designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards (i.e., to assure that all individuals assigned to guard duties are capable of safely and effectively performing all of the normal and emergency duties required by the guard positions to which they are assigned).

b. The employee demonstrates, by medical examination and/or practical test, as necessary, the ability to effectively and safely perform all of the routine and emergency duties that management, with the intent of accommodating the employee's deficiency, has assigned to him or her within the medical or physical limitations determined necessary by the designated physician.

c. A statement of demonstrated ability is prepared by the employee's supervisor and signed by the responsible field authority and the designated physician. The statement of demonstrated ability must clearly (1) identify the employee, (2) state the nature and degree of the specific medical or physical defect, (3) record any medical or physical job limitations determined to be necessary by the designated physician, (4) record the satisfactory medical evaluation and/or performance of the practical test, and (5) state the date and type of medical or practical test administered.

d. Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed 2 years.

12. Uniform Application

a. With respect to Government-employed protective personnel, the medical qualifications set forth above, shall be applied uniformly to all such employees consistent with the provisions of DOE IMD 3300 "Merit Staffing" and DOE IMD 3752, "Discipline" (to be issued) for DOE employees, and with the personnel provisions of the GSA Administrative Manual for GSA employees.

b. With respect to contractor-employed protective personnel contractors shall administer and apply the medical qualifications set forth above, in accordance with their published personnel policies and practices, including the

provisions of existing collective bargaining agreements, and consistent with the policies set forth in DOEPR 9-50.1201-2 Where existing labor or collective bargaining agreements, etc. are in conflict with the provisions of this part, efforts shall be made to bring these into conformance as soon as possible.

B. SECURITY INSPECTOR FORCE

1. When Required. A security inspector force is required at facilities which:

   a. Are Class "A" facilities, except those which are utilized solely as administrative areas.

   b. Contain nuclear weapons, nuclear test devices, complete nuclear assemblies, or significant quantities of special nuclear material.

   c. Contain security areas where classified matter cannot be adequately safeguarded during working hours by employees or during non-working hours by alarm protection.

2. Duties. Security inspectors shall perform the following duties:

   a. Enforce regulations concerning trespass, exclusion of prohibited articles, personnel identification, protection of classified matter, and special nuclear material.

   b. Observe and patrol designated perimeters, areas, and structures.

c. Prevent persons or vehicles from gaining unauthorized access to security areas.

d. Check repositories, rooms, or buildings containing classified matter during nonworking hours to determine that they are locked or otherwise in order.

e. Perform escort duties.

f. Respond to protective alarm signals or other indications of suspicious activity.

g. Act as necessary in the event of situations affecting the security of the facility, including fires, industrial accidents, internal disorders, and attempts to commit espionage, sabotage, or other criminal acts.

h. Protect classified matter and Government property against unauthorized access, theft, or intentional damage.

i. Report to supervisors all incidents or unusual circumstances affecting the security of the area at the time of occurrence or as soon thereafter as possible.

3. Emergency Duties. Plans covering emergency duties and deployment of security inspectors and other protective personnel shall be established and maintained at Class "A" facilities to assure adequate protection in the event of attempted or actual sabotage, theft, disaster, labor disturbance, or other situations threatening the security of the facility.

4. Training.

a. Prior to initial assignment to duty, each security inspector shall successfully complete a course of basic qualification training consisting of a minimum of 80 hours of classroom and practical instruction. Qualification training courses shall include at least the following subjects.

(1) General orientation.

(2) Purposes and principles of the DOE system of security.

(3) Security as applied to the local installation.

(4) Organization and functions of DOE and DOE contractor security inspector forces.

(5) Legal authority of the individual security inspector.

(6) Specific duties, including sufficient "breaking-in" training.

(7) Security inspector orders - general and specific.

(8) Discipline - obedience to orders.

(9) Employee and public relations.

(10) Self-defense.

(11) Communications facilities and procedures.

(12) Elementary first aid and fire protection.

(13) Report writing.

(14) Riot control.

(15) Safety and general training sufficient to provide knowledge of and protection from unique hazards of materials and operations.

(16) Operation and use of all security inspector post special and technical equipment such as metal, explosive, and SNM detectors, personnel identification systems, and night vision devices.

(17) If assigned to protect nuclear weapons, nuclear test devices, or special nuclear materials, additional advanced and specialized training shall be provided as appropriate to assigned job functions.

b. Before a security inspector shall be considered adequately trained and assigned to fully independent duties, the security inspector shall either be given a written examination or appropriate appraisal to verify his/her readiness to carry out the responsibilities to be assigned. If written examinations are given, test papers shall be retained for examination during scheduled security surveys.

c. Security inspectors shall be provided a minimum of 24 hours refresher training annually. Subject material for refresher training should

emphasize a review of duties, responsibilities, and procedures in which instruction is most urgently needed as determined by job performances and supervisor recommendations.

d. Records shall be maintained of the nature of all training conducted and the names of the security inspectors so trained.

5. Firearms Qualification

a. A security inspector shall not be authorized to carry a firearm until the responsible field office manager is assured within the limitation of his/her normal administrative capabilities, that the individual who is to be armed is emotionally stable and has qualified in accordance with DOE firearms standards. These requirements shall be applied to employees as set forth in A.12., above.

b. All security inspectors shall qualify initially, and subsequently at least annually, using the type and barrel-length of handgun, semiautomatic rifle, and shotgun and with the types of ammunition with which they are armed while on duty, on the DOE approved courses of fire specified in annex A. Authority to carry a firearm shall not be granted until a security inspector has qualified under the standards established. A minimum qualification score must be attained annually on each of the six approved courses of fire, and the scores shall be recorded on Form DOE-614. Initial establishment of requalification anniversaries for individual security inspectors on the various weapon courses of

fire shall be at the discretion of field office managers. It is recommended that these be dispersed throughout a 12-month period so that a year will not elapse between weapon firing periods and individuals will benefit from weapons practice at more frequent intervals.

c. Authority to carry a firearm shall be revoked if a security inspector fails to qualify annually on the approved courses of fire.

d. A Firearms Qualification Record, Form DOE-614, shall be maintained for each security inspector who qualifies, or who attempts to qualify, under B.5.b., above. Each record shall be retained until the next scores are entered on a new record and placed in the security inspector's file. Current records shall be retained for one year after separation of a security inspector from security inspector duties. The security inspector force chief or his/her supervisor shall be designated in writing as the individual authorized to certify the validity of the scores. Failure to certify a score prior to issuance of firearms authorization to a security inspector or submission of a false certification by the individual so designated shall be grounds for severe disciplinary action.

6. Authority to Carry Firearms. Section 161.k. of the Atomic Energy Act of 1954, as amended, authorizes the appropriate arming of DOE or DOE contractor personnel while engaged in the protection of property of the United States located at facilities owned by or contracted to the United States. Each

security inspector receiving this authorization shall be issued a laminated card containing the security inspector's photograph, signature, and actual or facsimile signature of the issuing DOE or DOE contractor official (if a facsimile signature is used on the card, a signed memorandum constituting the authorization shall be kept on file), date of issuance, and the following statement:

> "This is to certify that (name of guard) whose photograph and signature appear hereon has been authorized by the Manager, _____ Office, United States Department of Energy, pursuant to Section 161.k. of the Atomic Energy Act of 1954, as amended to carry firearms in the performance of his official duties while engaged in the protection of property owned by the United States and located at (facility name and location)." *

7. Equipment

   a. Uniform. Security inspector personnel shall be distinctively uniformed while on duty and identified with their function by appropriate emblems or badges.

* When a security inspector is assigned to several locations and it is impractical to specify all such locations on the card, the card may state "facilities owned by or contracted to the United States" instead of stating the facility name and location. However, each location to which the security inspector is assigned shall be identified and kept on file.

b. Arms and Ammunition. All security inspectors while on duty shall be armed with a combination of handgun and ammunition which develops a minimum of 300 foot-pounds of energy at the muzzle. Such weapons shall be in serviceable condition, fully loaded, and ready to use at all times while on duty. Additional weapons, such as rifles and shotguns will be available for, and issued to, security inspector forces as necessary. There shall be at least one auxiliary weapon plus 25% spare weapons for each security inspector post where nuclear weapons, major weapon components, or significant quantities of SNM are involved.

c. Vehicular patrols shall be equipped with either rifles or shotguns depending upon the terrain and the nature of the patrol. Firearms shall not be left unsecured in unattended vehicles.

d. V-100 s or other armored response vehicles shall be equipped with machine guns and auxiliary weapons. Adequate ammunition for all weapons shall be present on the vehicles when they are in a response readiness mode.

e. Security inspectors shall carry at least 12 rounds of extra handgun ammunition and shall have available flashlights and other equipment essential to the performance of the duties.

8. Use of Firearms

a. General Policy. The DOE will support the use by security inspectors of reasonable force (that is, the use of the minimum force, as indicated by the circumstances at the time) necessary for the discharge of their duties of safeguarding persons, classified information, classified matter, or special nuclear material.

Any incident involving use of a firearm by security inspectors will be reported immediately to the Director, Safeguards and Security, Headquarters.

b. Specific Incidents. In this regard, DOE will support the use of firearms by a security inspector carrying out his/her official responsibilities in conjunction with incidents of actual or attempted (1) substantial bodily harm to any person, as would constitute a felony under either Federal or applicable state law, or to apprehend an individual who has committed such an act, (2) theft or compromise of classified information or material, (3) theft or destruction of special nuclear material, and (4) damage or destruction of a facility which would seriously impair the ability of the DOE to safeguard special nuclear material, classified information, or nuclear weapons. The use of firearms will not be authorized if, under a reasonable view of the incident as it appeared at the time, lesser means would suffice.

c. Prevention of Unauthorized Access to DOE Security or SNM Areas. If a single individual attempts to enter an DOE security or SNM area without authority, a security inspector should not use a firearm to prevent the intrusion unless (1) there is a reason to believe that the intruder has firearms, explosives, incendiaries, or other instruments which could cause substantial bodily harm, or destruction of special nuclear material, or (2) the intruder attempts to use violence to gain admittance, and may thus inflict substantial bodily harm, and lesser means will not suffice to prevent the intrusion.

If more than one person attempts to enter a security area and it can reasonably be inferred that they intend to cause substantial bodily harm or theft or compromise of classified information or theft or destruction of special nuclear material, the use of firearms by the security inspector to prevent the intrusion is authorized if lesser means will not suffice.

d. Prevention of Theft or Sabotage of Nuclear Weapon or Nuclear Explosive Device. The loss of a nuclear weapon or nuclear explosive device through theft or sabotage would have the most serious consequences on the safety of the U.S. public and could seriously disrupt our national operations. Security inspectors are expected to discharge their firearms with the intent of hitting and if necessary, killing the person or persons being fired upon if such

action is the minimum amount of force necessary to prevent the theft or destruction of nuclear weapons or other nuclear explosive devices.

e. Self-Defense or Defense of Another Person. If the security inspector has reason to believe that substantial bodily harm to himself or another person is imminent, the use of firearms for defense is authorized when lesser means will not suffice to prevent such harm.

f. Prevention of Escape. If a person attempts to escape after having compromised or stolen classified information, or after having stolen or destroyed special nuclear material, or attempts to escape after having caused substantial bodily harm to any person, the use of firearms to prevent escape is authorized. Such use also is authorized if the person attempting to escape uses or threatens to use firearms or other forms of violence which may inflict substantial bodily harm. In any case, the use of firearms is authorized only if lesser means cannot prevent the escape.

g. Use of Firearms for Unauthorized Purposes. If a security inspector intentionally discharges a firearm for unauthorized purposes, DOE will take, or will request that the security inspector's employer take, appropriate disciplinary action. Examples of unauthorized purposes are the killing of animals, except as necessary in the interest of mercy, and unauthorized target practice.

h. Carrying of Firearms. Security inspectors shall carry only the firearms specifically authorized and shall not display or relinquish them to any person other than a supervisor, relief guard, or weapons room clerk.

Strict accountability for every firearm will be maintained by security inspector force supervisors.

i. Storage and Maintenance of Firearms.

1) All firearms in storage shall be securely locked in a substantially constructed container which is either fastened to the floor or wall or otherwise secured or is too heavy for easy removal. Access to keys or combinations shall be limited to supervisors and personnel authorized by supervisors to remove firearms.

2) An up-to-date inventory, listing the type of weapon, the manufacturer, and its serial number shall be conducted annually. Ammunition also shall be inventoried annually. The chief of the security inspector force or his/her supervisor shall attest as to the validity of the results.

All firearms shall be carefully inspected at least twice a year to determine serviceability, and a record of firearms maintenance checks shall be maintained. A minimum trigger pull of 2 1/2 pounds for all firearms shall be required.

j. Firearms for Emergency Use. Firearms that are maintained on post for use during emergencies shall be under the direct control of the security inspector on duty. Such firearms shall be in a position that they will be readily accessible to the guard on duty but inaccessible to the persons passing through the guard post.

9. Use of Aerosol Irritants or Other Tear Gas

a. Security inspectors will be instructed in the use of aerosol irritants or other tear gas which may be provided them.

b. Security inspectors are authorized to use aerosol irritants or other tear gas when its use is the exercise of reasonable force (that is, the minimum force, as indicated by the circumstances at the time) necessary for the discharge of their duties of safeguarding persons, classified information, classified or special nuclear material, or Government property.

c. In the event of use of aerosol irritants or other tear gas, care should be exercised, wherever possible, (1) to avoid direct or close application to the eyes of any person, and (2) to assure the availability of prompt medical attention to any persons affected. Any use of aerosol irritants or other tear gas must be immediately reported to the Director, Safeguards and Security, Headquarters.

10. Access Authorization

a. A DOE "Q" access authorization shall be required for security inspectors assigned for the protection of nuclear explosives or significant quantities of SNM or control of access to security areas containing such materials. A DOE "Q" access authorization shall be required for security inspectors assigned for protection to Top Secret or Secret Restricted Data, or cryptographic matter of any classification, or control of access to security areas containing such matter. If there is no access to any Restricted Data in the normal course of duty, a DOE Top Secret access authorization is acceptable in lieu of a "Q".

b. A DOE "L" access authorization shall, as a minimum, be required for security inspectors assigned for protection of matter classified Secret, National Security Information or Confidential Restricted Data, or for control of access to security areas containing such matter. If there is no access to any Restricted Data in the normal course of duty, a DOE secret access authorization is acceptable in lieu of an "L".

c. A Secret clearance granted by the Department of Defense may be used in lieu of a DOE access authorization for protective personnel assigned for the protection of matter classified Secret or Confidential National Security Information, or for control of access to security areas containing such matter.

11. Orders. General and special orders shall be issued in writing covering each post, patrol, or other assignment. They shall be clear, concise, and reviewed at any time that the duties are changed, or at least semiannually to assure that they are current. Dates of such review shall be recorded on the order and initiated by the supervisor making the review.

12. Supervision. Supervision of a security inspector force shall be provided to the extent required to assume proper and adequate performance of security inspector duties.

    a. Personal Supervision. At facilities where security inspector forces of more than 3 security inspectors for each shift are engaged, there shall be fulltime personal supervision. For shifts employing more than three security inspectors, there shall be a minimum of one supervisor for every 12 security inspectors.

       1) Each security inspector shall be inspected by his/her supervisor upon reporting for duty to determine his/her apparent physical fitness and the condition and adequacy of his sidearm, uniform, or other equipment. At such time, he/she shall be given necessary special instructions or orders.

       2) Each security inspector post, patrol, and other activity shall be personally inspected by supervisory personnel at least twice each shift to determine that personnel and the system in general are functioning properly.

b. Supervision by Other Means. Various means and devices, such as recorded and supervisory tour systems, may be utilized as supplements to personal supervision or, in the case of small facilities or remote areas, to supplant personal supervision as a means of assuring that the necessary areas are patrolled and that other functions are performed.

c. Reports. All security inspector personnel shall report regularly to their headquarters by established means of communication. Records of tours and reports to headquarters shall be checked carefully by security inspector supervisors. Failure of a security inspector to record a visit at a designated station, to report to headquarters as required, or other deviation from established report procedures, shall be investigated immediately.

d. Duty Log. A continuous record of all significant or unusual security inspector force activity, including details of any matters or occurrences having a bearing on the security of the facility, shall be maintained for each shift or day.

C. GUARDS

1. Basic Considerations. Guards may be utilized at DOE and contractor administrative buildings and other locations where there are no nuclear weapons, nuclear weapon components, significant quantities of SNM, Top Secret

documents, cryptographic material, or material having similar sensitivity. When utilized, guards shall be carefully instructed in their duties and responsibilities with respect to the protection of classified matter.

2. Duties. Guards shall observe and physically check locked repositories containing classified matter, respond to protective alarm signals, and report any untoward incident involving DOE classified matter or government property to a supervisor immediately.

3. Access Authorization. DOE access authorization for guards shall be the same as prescribed for security inspectors in B.10., above.

4. Qualification. Guards used for the protection of classified matter shall be subject to medical examination on initial assignment and at least biennially thereafter to assure their fitness to perform their duties under normal or emergency conditions. Training as specified in B.4. and B.9., above, applicable to the functions performed shall be given to guards and an appraisal reached as to the readiness to carry out the responsibilities assigned.

D. COMMUNICATIONS FOR PROTECTIVE PERSONNEL

1. Class "A" Facilities. (As modified in B.1.a.) Security inspectors at fixed posts shall have

both normal telephone service and two-way radio communication with central stations as well as points from which backup forces will be dispatched. Administrative controls shall be established to assure proper use of this system in an emergency. Duress alarms shall be provided at the security inspectors posts.

2. Class "B" Facilities. Class "B" facilities employing protective personnel to protect DOE classified matter shall be provided with a system which will afford both intraplant and outside communication.

3. Tests. Daily tests of protective communications systems are required.

E. SECURITY INSPECTOR POST STANDARDS

Permanent security inspector posts constructed after the date of this issuance controlling access to areas containing weapons, nuclear test devices, or complete nuclear assemblies, or special nuclear materials of the types and in amounts falling within the scope of IMD 6103 shall meet the following minimum standards:

1. Where geography and building arrangement permit, the security inspector station should be situated to provide an unobstructed view of the surrounding terrain.

2. Exterior walls (excluding windows) and doors shall be constructed of ore reinforced with materials which have a bullet penetration resistance equivalent to U.L. Class II.

3. Windows shall consist of 3/8" polycarbonate plastic behind 3/8" thick laminated safety glass or equivalent material or materials having bullet resistance equivalent to U.L. Class I.

4. Lights shall provide a minimum of two foot candles luminescence at ground level for at least a 30-foot diameter circle around the security inspector post and 0.2 foot candles for 150 feet in both directions on the roadway. Sodium vapor lamps are preferred.

5. If the security inspector post controls pedestrian traffic, a well-marked covered pedestrian lane shall be provided in front of the security inspector station.

6. Where a security inspector station controls vehicular access to a security area, the gates shall be constructed to permit closing from inside the security inspector station.

7. Security inspector posts should be equipped with communications systems in accordance with the requirements of D.1. or D.2., above.

IMD NO. 6102 January 31, 1978

ANNEX A

APPROVED COURSES

FIREARMS QUALIFICATION

1. Handgun - Day Qualification

DOE Day Handgun Course

(National Police Combat Course)

	Range	No. of Rounds	Time	Target
Stage 1	7 yds.	12	25 seconds	B-27
Stage 2	25 yds.	18	90 seconds	B-27
Stage 3	50 yds.	24	2 minutes, 45 seconds	B-27
Stage 4	25 yds.	6	12 seconds	B-27

Total 60 rounds

Score: Maximum possible - 300 Minimum qualifying - 200

FIRING STAGES

Stage 1 - 7 yards - double action - twelve rounds from the crouch position. Twenty-five seconds, time starts

with loaded gun in holster and includes reloading for second six round string.

Stage 2 - 25 yards - double action - six rounds kneeling, six rounds standing left hand from behind barricade, six rounds standing right hand from behind barricade. Ninety seconds, time starts with loaded gun in holster and includes reloading for subsequent six round strings.

Stage 3 - 50 yards - single or double action - six rounds sitting, six rounds prone, six rounds standing left hand from behind barricade, and six rounds standing right hand from behind barricade. Two minutes and forty-five seconds, time starts with loaded gun in holster and includes reloading for subsequent six round strings.

Stage 4 - 25 yards - double action - six rounds standing without support. Twelve seconds, time starts with loaded gun in holster. No barricade or other support is used.

The NRA Police Combat Rule booklet gives full details on the positions for firing each stage of the National Police Combat Course.

2. Handgun - Night Qualification

DOE Night Handgun Course

	Range	No. of Rounds	Time	Target
Stage 1	7 yds.	12	35 seconds	B-27
Stage 2	15 yds.	12	45 seconds	B-27

Total 24 rounds

Score: Maximum possible - 120 Minimum qualifying - 60

Firing Stages 1 and 2 - double action; standing or crouch position without artificial support; one or both hands; natural lighting augmented only by normal incidental firing range courtesy lighting. Time starts with loaded gun in holster and includes reloading for second six-round string.

3. Semiautomatic Rifle - Day Qualification

DOE Day Rifle Course

	Range	No. of Rounds	Position	Time	Target
Stage 1	100 yds.	5	Standing	30 seconds	B-27
Stage 2	100 yds.	5	Kneeling	30 seconds	B-27
Stage 3	100 yds.	5	Sitting	30 seconds	B-27
Stage 4	100 yds.	5	Prone	30 seconds	B-27

Total 20 rounds

Score: Maximum possible - 100 Minimum qualifying - 70

Firing Stages 1-4 - Semiautomatic mode of fire; no artificial support; iron sights; time begins with shooter in firing position, magazine with 5 rounds loaded in weapon, first round unchambered. (This course is applicable to all semiauto/auto rifles including M-1, M-14, M-16, M-1 and M-2 carbine, and Thompson submachine gun).

4. Semiautomatic Rifle - Night Qualification

DOE Night Rifle Course

	Range	No. of Rounds	Position	Time	Target
Stage 1	25 yds.	5	Standing	45 seconds	B-27
Stage 2	25 yds.	5	Kneeling	45 seconds	B-27
Stage 3	25 yds.	5	Sitting	45 seconds	B-27
Stage 4	25 yds.	5	Prone	45 seconds	B-27
		Total 20 rounds			

Score: Maximum possible - 100 Minimum Qualifying -50

Stages 1-4 - Semiautomatic mode of fire; no artificial support; iron sights; natural lighting augmented only by normal, incidental firing range courtesy lighting; time begins with shooter in firing position, magazine with 5 rounds loaded in weapon, first round unchambered. (Applicability same as DOE Day Rifle Course).

5. Shotgun - Day Qualification

DOE Day Shotgun Course

	Range	No. of Rounds	Position	Time	Target
Stage 1	15 yds.	5	Hip fire	15 seconds	B-27
Stage 2	25 yds.	5	Shoulder	15 seconds	B-27
		Total 10 rounds			

Score: Maximum possible - All available pellets within black silhouette (Dependent upon shell load fired).

Minimum qualifying - One-half of all available pellets within black silhouette.

Stages 1 and 2 - Semiautomatic or manual mode of fire; no artificial support; time begins with shooter in firing position, magazine loaded with 5 rounds, first round

unchambered; "00" buckshot load (consistent with local standard practice, magnum, or standard round loads may be used).

6. Shotgun - Night Qualification

DOE Night Shotgun Course

	Range	No. of Rounds	Position	Time	Target
Stage 1	15 yds	5	Hip fire	15 seconds	B-27
Stage 2	25 yds	5	Shoulder	15 seconds	B-27
		Total 10 rounds			

Score: Maximum possible - All available pellets within black silhouette (Dependent upon shell load fired).

Minimum qualifying - One-half of all available pellets within black silhouette.

Stages 1 and 2 - Semiautomatic or manual mode of fire; no artificial support; time begins with shooter in firing position, magazine loaded with 5 rounds, first round unchambered; natural lighting augmented only by normal, incidental firing range courtesy lighting; "00" buckshot load (consistent with local standard practice, magnum or standard round loads may be used).

Note: Scoring of the B-27 target for handgun and semiautomatic rifle qualification shall be in accordance with the "Training and Qualification Scoring" specified on the target (i.e., hits in the 10, 9, and 8 rings score 5 points; hits in the 7 ring score 4 points; all other hits within the black silhouette score 3 points).

ATTACHMENT B2

U.S. DEPARTMENT OF ENERGY

Washington, D.C.

NOTICE
DOE N 5632.1

8-13-79
EXPIRES: 8-12-80

SUBJECT: PHYSICAL PROTECTION OF CLASSIFIED MATTER AND INFORMATION

1. PURPOSE. This notice revises standards and procedures contained in IMD 6102 Appendix Part IV for determining the physical fitness condition of, and the identity of individuals eligible to be granted waivers of certain parts of the medical and physical fitness standards for, security inspectors employed or to be employed, under direct or indirect contract to the Department of Energy (DOE).

2. SCOPE. The provisions of this notice apply to all elements of DOE, including the Federal Energy Regulatory Commission (FERC) and to DOE con-

tractors and subcontractors who employ security inspectors under DOE contracts.

3. REFERENCE. IMD 6102, Serial No. 56, Appendix IV, Physical Protection of Classified Matter and Information (Protective Personnel), of 1-31-78, as extended by DOE N 1321.45, of 6-26-79.

4. INSTRUCTIONS.

a. Delete the present paragraph A.7. on page 13 of IMD 6102, Appendix IV and replace with the following:

"7. Security Inspector Physical Fitness Qualification.

a. It is essential to the acceptable performance of security inspector duties that individuals possess a level of physical fitness training and conditioning which is adequate to provide reasonable assurance of their continuing capabilities to safely and effectively perform the physically strenuous emergency duties which are reasonably and realistically anticipated to be demanded of the security inspector position to which they are assigned. Subject to a determination and written certification by a designated physician that there are no medical contraindications to participation disclosed by medical examination conducted within the preceding 30 days, prior to initial assignment to security inspector duties and annually thereafter, the physical fitness condition of security inspectors

and applicants shall be evaluated. Performance within a period of 30 minutes of a physical exercise program, approximating in physical performance demands those of the following generic program, is acceptable for demonstration by an individual of satisfactory completion of physical fitness maintenance training and conditioning adequate to provide reasonable assurance of a continuing capability to respond to the demands of assigned security inspector emergency response duties:

(1) Climb a 30-foot ladder.

(2) Run 100 yards in 20 seconds and maintain functional capabilities.

(3) Scale a 7-foot vertical barrier.

(4) Sustain arduous activity for 3 minutes (i.e., jogging in place, pushups, pullups, or other combinations of comparably strenuous activities)

(5) Pick up and carry 60 pounds for 30 feet.

(6) Drag 175 pounds for 10 feet.

b. At those facilities where any of the elements of the generic exercise program cannot be validated as job-related during reasonably postulated emergency situations, heads of field offices shall substitute alternate elements of similarly strenuous physical demands which can be validated as job-related and justified by business necessity in accordance with the Uniform Guidelines on Employee Selection Procedures (1978), 43 F.R. 38290 (8-25-78).

c. On a case-by-case basis as the need may be indicated, individuals should be provided encouragement, guidance and a reasonable amount of assistance and support in undertaking a program of physical fitness training which will enable them to achieve a satisfactory level of physical fitness conditioning. Initial and subsequent annual satisfactory evaluation of an individual's physical fitness is required for assignment to security inspector duties. In the event an individual is unable to perform certain specific elements of a validated site-specific physical exercise program because of physical disability or an inability to attain a sufficiently high level of physical fitness conditioning, the overall physical fitness condition of the individual should be evaluated in the context of, and consistent with, the objective of providing reasonable assurance of safe and effective performance of strenuous site-specific emergency response duties. In special cases involving individuals who possess high levels of professional qualifications and/or

experience, the cognizant field office management authority may consider the waiving of individual elements of the physical exercise program provided that the requirements, procedures, and guidelines of Section A.8. of this part are followed."

b. In the first line of the text of Section A.8. on page 13 of IMD 6102 Appendix IV delete the words "incumbent security inspectors" and replace with the words "individuals who possess high levels of professional qualifications and/or experience".

c. In the first and fourth lines of paragraph A.8.b. and the first and fourth lines of paragraph A.8.c. change the words "employee" and "employee's" to read "individual" and "individual's", respectively.

d. Add new paragraph A.8.e. on page 14 as follows:

"e. Individual security inspector employees covered by this Directive who have been adversely affected by application of the standards may appeal the denial of a request for waiver by the contractor or subcontractor, and the denial of a waiver, to the cognizant DOE field office for review. Further evidence may be offered going solely to the medical or physical fitness of the individual involved. An employee may select a representative of his or her own choice to assist and/or appear in the employee's behalf in any appeal. After findings and a determination at that level, such employee may petition as a matter of right to the Director of Safeguards and Security of the Department for review and determination on

the record. At the discretion of the Director, an employee or his representative may present oral argument to the Director."

e. Add new paragraph A.11.e. on page 19 as follows:

"e. Individual guard employees covered by this Directive who have been adversely affected by application of the standards may appeal the denial of a request for waiver by the contractor or subcontractor, and the denial of a waiver, to the cognizant DOE field office for review. Further evidence may be offered going solely to the medical or physical fitness of the individual involved. An employee may select a representative of his or her own choice to assist and/or appear in the employee's behalf in any appeal. After findings and a determination at that level, such employee may petition as a matter of right to the Director of Safeguards and Security of the Department for review and determination on the record. At the discretion of the Director, an employee or his representative may present oral argument to the Director."

f. The substances of the foregoing revisions are being incorporated in DOE Order 5632 "Protective Personnel" which is being coordinated to supersede IMD 6102 Appendix IV.

FOR THE SECRETARY OF ENERGY:

William S. Heffelfinger
Director of Administration

PART 1046—PHYSICAL PROTECTION OF SECURITY INTERESTS

Subpart A—General

Sec.
1046.1 Purpose.
1046.2 Scope
1046.3 Definitions.

Subpart B- Protective Force Personnel

1046.11 Medical and Physical Fitness Qualification Standards.
1046.12 Physical Fitness Training Program.
1046.13 Medical certification.

APPENDIX A TO SUBPART B. PART 1046—MEDICAL AND PHYSICAL FITNESS QUALIFICATION STANDARDS.

AUTHORITY: Sec. 2201, Pub. L. 83-703, 68 Stat. 919 (42 U.S.C. 2011 et seq.); sec. 7151, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.)

SOURCE: 49 FR 46101, Nov. 23, 1984, unless otherwise noted.

Subpart A—General

§1046.1 Purpose.

The purpose of this part is to set forth Department of Energy, hereinafter "DOE," security policies and procedures regarding the physical protection of security interests.

§1046.2 Scope.

This part applies to DOE contractor employees at Government-owned facilities, whether or not privately operated.

§1046.3 Definitions.

For the purposes of this part:

Contractor. The term "contractor" includes subcontractors at all terms.

Defensive Combative Personnel. Security inspectors other than offensive combative personnel.

Designated Physician. An occupational medical physician who is recommended by the designated management supervisory official of the local DOE field office and authorized by the Medical Director, Office of Operational and Environmental Safety, Headquarters, to determine the medical and physical condition of protective force personnel. When an occupational medical physician is not available, physicians who are not board-certified in occupational medicine may be recommended and authorized by the Medical Director as designated physicians for the purpose of this part. Designated physicians need not be employed full-time, but contractually shall be responsible to DOE for performance of the medical functions required by this part.

Facility. An educational institution, manufacturing plant, laboratory, office building or other area utilized by the DOE or its contractors or subcontractors for the performance of work under DOE jurisdiction.

Field Organization. Any organizational component of the DOE located outside the Washington, D.C. metropolitan area.

Guard. An unarmed individual who is employed for, and charged with, the protection of classified matter or Government property.

Medical Condition. General health, physical condition, and emotional and mental stability.

Offensive Combative Personnel. Security inspectors assigned to response force duties including pursuit and assault functions.

Protective Force Personnel. Guards and security inspectors assigned to protective details, who are employed to protect DOE security interests.

Security Inspector. A uniformed person who is authorized under section 161.k of the Atomic Energy Act of 1954, as amended, or other statutory authority, to carry firearms and to make arrests without warrants and who is employed for, and charged with, the protection of classified matter, special nuclear material, or other Government property.

Subpart B—Protective Force Personnel

§1046.11 Medical and Physical Fitness Qualification Standards.

(a) Except as provided in subparagraph (b) DOE contractors shall not employ as protective force personnel any individual who fails to meet the applicable medical and physical fitness qualification standards as set forth in Appendix A, to this subpart, "Medical and Physical Fitness Qualification Standards."

(b)(1) Incumbent security inspectors have until (insert date 12 months from effective date of regulation) to meet the applicable physical fitness qualification standards.

(2) Current waivers to the medical qualification standards remain in effect and future waivers are permitted.

(c) Each security inspector shall meet the applicable medical and physical fitness qualification standards every twelve months after the initial qualification. Each guard shall meet the applicable medical standards every two (2) years after the initial qualification.

§1046.12 Physical Fitness Training Program.

(a) Beginning January 24, 1985, each incumbent security inspector, who has not met the applicable physical fitness qualification standard, shall participate in a DOE approved physical fitness training program. Once an incumbent security inspector has begun a physical fitness training program, it must be completed before the security inspector may take the applicable physical fitness qualification standards test. Once a physical fitness training program is completed, an

incumbent security inspector has thirty (30) days to meet the applicable physical fitness qualification standards.

(b) An incumbent security inspector who fails to qualify within thirty (30) days of completing a physical fitness training program shall participate in an additional training program. Upon completion of the additional physical fitness training program the security inspector has thirty (30) days to meet the applicable physical fitness qualification standard. No additonal training or time extension to meet the standards is permitted except for unusual circumstances as set forth in the Appendix, Paragraph G(2).

(c) A security inspector who fails to requalify within thirty (30) days after his or her yearly anniversary date of the initial qualification shall participate in a physical fitness training program. Security inspectors have a maximum of six (6) months from the anniversary date to requalify.

(d) After his or her initial qualification, each incumbent security inspector shall participate in a DOE-approved physical fitness training program on a continuing basis. This training is for the purpose of ensuring that security inspectors maintain the requisite physical fitness for effective job performance and to enable the individual security inspector to pass the applicable annual physical fitness requalification test without suffering any undue physical injury.

[49 FR 46101. Nov. 23, 1984, as amended at 51 FR 7248, Mar. 3, 1986]

§1046.13 Medical certification.

Each individual shall have a medical examination within thirty (30) days preceding participation in a physical fitness training program and the physical fitness qualification standards test, and a determination and written certification by a designated physician that there are no foreseeable medical risks as disclosed by the medical examination to the individual's participation in a physical fitness training program and the physical fitness qualification standards test.

APPENDIX A TO SUBPART B OF PART 1046—MEDICAL AND PHYSICAL FITNESS QUALIFICATION STANDARDS

A. *Applicability.* This Appendix A to Subpart B of Part 1046 provides the minimum medical and physical fitness qualifications, criteria, and guides to be used by designated physicians and management supervisory officials in advising responsible DOE officials whether the medical and physical condition of protective force personnel to be employed by DOE contractors reasonably assures that they can effectively perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site and the general public.

B. *Application of Medical and Physical Fitness Qualification Standards.*

(1) The standards in this Appendix are the minimum necessary to determine the medical and physical capability of protective force personnel to perform all normal and emergency duties effectively and safely.

(2) Security inspector applicants shall meet the applicable physical fitness standards in this Appendix prior to assignment to security inspector duties.

(3) Incumbent security inspectors shall meet the applicable physical fitness standards in this Appendix within one year of the effective date of these standards and once every twelve months thereafter or shall be relieved of security inspector duties subject to the provisions in paragraph G below.

(4) Incumbent security inspectors shall meet the applicable medical standards prior to assignment to security inspector duties and annually thereafter, subject to the provisions of paragraph G below.

(5) Guards shall meet the applicable standards in this Appendix prior to assignment to guard duties and biennially thereafter, subject to the provisions of paragraph J below.

(6) The determination of whether or not the examinee meets the medical standards in this Appendix shall be made by a designated physician.

(7) The determination of whether or not the examinee meets the physical fitness standards in this Appendix shall be made by a designated management supervisory official in coordination with a designated physician.

(8) When a designated physician determines that special medical evaluations and practical performance tests are necessary in order for an examinee to demonstrate the examinee's abilities to perform all normal and emergency duties, a determination of the adequacy of performance shall be made by a designated physician.

(9) For those facilities where it is necessary to determine the medical qualification of security inspectors or security inspector applicants to perform special assignment security inspector duties which might require exposure to unusually high levels of stress or physical exertion, field office managers may develop more stringent medical qualification requirements or additional medical or physical tests as necessary for such determinations. All such additional qualification requirements shall be forwarded, with justification, for the approval of the Director of Safeguards and Security, Headquarters, prior to application and if approved, shall be

implemented in the same manner that these qualification standards have been implemented.

(10) The provisions of DOE 5480.1A, ENVIRONMENTAL PROTECTION, SAFETY, AND HEALTH PROTECTION PROGRAM FOR DOE OPERATIONS, of 8-13-81, Chapter VIII, Part 4 apply for return to work after recovery from a temporarily disqualifying medical or surgical condition.

C. *Administrative Procedures and Requirements.*

(1) *Medical Confidentiality and Retention of Medical Reports.*

(a) The medical information and data on each employee or applicant shall be maintained as confidential, privileged medical information and shall not be released by a designated physician without the written consent and release of the employee or applicant, except as permitted or required by law.

(b) When an individual has been examined by a designated physician, all available history and test results should be retained by the responsible DOE or DOE contractor medical department, in accordance with DOE 5480.1A, Chapter VIII, Part 4, whether or not the individual completes the examination, and whether or not potentially disqualifying defects are recorded.

(2) *Change of Health Status of Protective Force Personnel.*

(a) It is the specific responsibility of protective force employees to report immediately to their supervisor any known or suspected change in their health which might impair their capacity for duty or the safe and effective performance of assigned job duties.

(b) Supervisory personnel have the responsibility to make a timely report to a designated physician on any behavorial and health changes and deterioration in work performance that is observed in protective force personnel under their jurisdiction. Examples of areas that may indicate medical and emotional problems include: incidents of ineptness, poor judgment, lack of physical or emotional stamina, social incompatibility, excessive absence, lateness, and a tendency to become accident prone.

(3) *Use of Corrective Devices.*

(a) When the use of corrective devices, such as eyeglasses and hearing aids, is required tc enable an examinee to meet successfully medical qualification requirements, a determination shall be made by a designated line supervisory authority that the use of all such devices is compatible with all emergency and protective equipment that the examinee may be required to wear or use while performing his or her assigned job duties.

(b) It is incumbent upon cognizant field office management to exercise all reasonable and practicable effort to accommodate required emergency and protective equipment to the use of corrective devices, including the provision of equally effective alternate equipment if such is available.

(c) If eyeglasses are used, they shall be of the safety glass type.

D. *Security Inspector Medical Qualification Standards.*

(1) *General Qualifications.*

The examinee shall possess mental, sensorial, and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include:

(a) Mental alertness and reliable judgment;

(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written. spoken, audible, visible, or other signals; and,

(c) Motor power, range of motion, neuromuscular coordination and dexterity.

(2) *Specific Minimum Qualifications.*

(a) *Head, Face, Neck, Scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(b) *Nose.* Ability to detect odor of products of combustion and of tracer and marker gases.

(c) *Mouth and Throat.* Capacity for clear and audible speech as required for effective communication on the job.

(d) *Ears.* Hearing loss in the better ear not to exceed 30 db average at 500, 1000, 2000 Hz with no level greater than 40 db in any of these frequencies (by ISO 1964 and ANSI 1969 audiometry). If a hearing aid is necessary, suitable testing procedures shall be used to assure auditory acuity equivalent to the above requirement.

(e) *Eyes. 1 Distant Visual Acuity.*

(a) Uncorrected acuity of no less than 20/200 in the better eye.

(b) Corrected acuity of at least 20/30 in the better eye and 20/40 in the other eye.

(c) If uncorrected distant vision in the better eye is not at least 20/40, security inspectors shall carry an extra pair of corrective lenses.

2 Near Visual Acuity. Corrected or uncorrected vision of at least 20/40 (14/28 Snellen) in the better eye.

3 Color Vision. Ability to distinguish red, green, and yellow. Special color vision testing and certification shall be required where fine color discrimination is critical to the safe or effective performance of assigned job tasks.

4 Peripheral Vision. Field of vision in the horizontal meridian shall not be less than a total of 140 degrees.

5 Depth Perception. Adequate depth perception as measured by stereopsis or demonstration in a practical operational test.

(f) *Cardiorespiratory.*

1 Respiratory. Capacity and reserve to perform physical exertion in emergencies at least equal to the demands of the job assignment, and ability to utilize respiratory protective filters and air supply masks when this emergency equipment is required by assigned job requirements.

8. Significant Peripheral Vascular Insufficiency
9. Corrective Heart Surgery
10. Corrective Arterial or Great Vessel Surgery
11. Prosthetic Valve
12. Artificial Pacemaker

(c) *Endocrine/Nutritional/Metabolic.*

1 Any endocrine, nutritional, or metabolic condition that would not allow the examinee adequately to meet the stresses and demands of assigned normal or emergency job duties.

2 Inability to accommodate to changing work schedules or to a delay in meals without potential or actual incapacity.

3 Inability to tolerate prolonged use of wearing of protective garments such as respirator masks, air masks, or bullet-resistant garments.

4 Diabetes mellitus requiring the use of insulin. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous 2 years.

5 Obesity of such degree that it would interfer with the safe and effective performance of normal and emergency job duties.

(d) *Skin.* Recurrent severe dermatitis or hypersensitivity to irritants or sensitizers sufficient to interfere with wearing required personal protective equipment or likely to be aggravated by or interfere with established or required decontamination procedures.

(e) *Hematopoietic Dysfunction.* Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.

(f) *Malignant Neoplasms.* Malignant neoplastic disease.

(g) *Neurological.*

1 History of epilepsy or other convulsive disorder.

2 History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.

(h) *Eyes.* Total blindness in one or both eyes.

(i) *Mental and Emotional.* An established history or clinical diagnosis of any of the following:

1 Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotiional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

2 Attempted suicide or an expressed threat of suicide.

3 A condition in which a person's intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.

4 A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

5 The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. Examples of such medications are certain dosages or requirements for steroids, anticoagulants, antiarrhythmics, sedatives, and tranquilizers.

F. *Physical Fitness Standards for Security Inspectors.*

(a) The DOE field organization authority in consultation with a designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards to assure that all security inspectors are capable of safely and effectively performing all normal and emergency duties.

(b) The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physician, the ability to perform effectively and safely all routine and emergency duties.

(c) A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the satisfactory medical evaluation and/or performance of the practical test required by a designated physician.

(d)Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed one (1) year.

(e) Individuals who have been adversely affected by application of the standards may appeal the denial of waiver to the cognizant DOE safeguard and security field office for review within 60 days after the adverse action. Further evidence may be offered relating solely to the medical or physical fitness of the individual involved. Such individual may select a representative of his or her own choice to assist and/or appear in the individual's behalf in any appeal. After findings and a determination have been made at the field office level, such individual has a right to petition the Director of Safeguards and Security, DOE Headquarters, within 30 days of the field office's determination for a final determination based upon his or her review of the record of the case.

(2) There will be no waivers granted from the physical fitness standards set forth in Paragraph F above. However, time extensions not to exceed 6 months may be granted on a case-by-case basis for those individuals who, because of a temporary medical or physical condition as certified by a designated physician, are unable to satisfy the physical fitness standards within the required time period without suffering undue physical harm.

H. *Guard Medical Qualification Standards.*

(1) *General Qualifications.* The examinee shall possess mental, sensory, and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include.

(a) Mental alertness and reliable judgment.

(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals.

(c)Motor power, range of motion, neuro-muscular coordination, and dexterity.

(2) *Specific Minimum Qualifications.*

(a) *Head, Face, Neck, and Scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(b) *Nose.* Ability to detect odor of products of combustion and of tracer or marker gases.

(c) *Mouth and Throat.* Capacity for clear and audible speech as required for effective communication on the job.

(d) *Ears.* Hearing loss not to exceed 50 db average at 500, 1000, and 2000 Hz in one ear (by ISO 1964 or ANSI 1969 audiometry).

(e) *Eyes.* Near and distant visual acuity, with or without correction of at least 20/40 in the better eye. One-eyed individuals may qualify.

2 *Cardiovascular.* Normal configuration and function. Capacity for exertion during emergencies. Normal resting pulse; regular pulse. Full symmetrical pulses in extremities and neck. Normotensive, with tolerance to rapid postural changes. If an examination reveals significant cardiac arrhythmia, murmur, enlargement, hypertension, hypotention, or other evidence of cardiovascular abnormality, an evaluation by a specialist in internal medicine or cardiology may be required and evaluated by a designated physician.

(g) *Abdomen and Viscera.* No clinically significant abnormalities.

(h) *Musculo-Skeletal.* Normal symmetrical structure, range of motion, and power.

(i) *Skin.* No significant abnormal intolerance to chemical, mechanical and other physical agents. Capability to tolerate use of personal protective covering and decontamination procedures when required by assigned job duties.

(j) *Endocrine/Nutritional/Metabolic.* Endocrine/nutritional/metabolic status adequate to meet the stresses and demands of assigned normal and emergency job duties. Ability to accommodate to changing work and meal schedules without potential or actual incapacity.

(k) *Hematopoietic.* Normal function.

(l) *Lymphatic.* Normal.

(m) *Neurological.* Normal central and peripheral nervous system function.

(n) *Mental and Emotional.* Normal mental status and an absence of neurotic or psychotic conditions which would affect adversely an ability to handle firearms safely or to act safely and effectively under normal and emergency conditions.

(o) *Laboratory.*

1 Hemogram. Freedom from clinically significant abnormalities of the formed elements of the blood that could reasonably be expected to affect the safe and effective performance of assigned duties.

2 Urinalysis. Absence of proteinuria and glycosuria unless the absence of a disqualifying systemic or genitourinary condition and the absence of significant microscopic abnormality has been demonstrated.

3 Other Studies. Any other medical investigative procedure, including electrocardiogram and chest x-ray, which a designated physician considers necessary for adequate medical evaluation.

E. *Security Inspector Medical Disqualification Standards.*

(1) *Freedom from Incapacity.* The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

(2) *Conditions for Medical Disqualification.* The presence of any of the following conditions shall disqualify the examinee from employment as a security inspector.

(a) *Respiratory.* Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.

(b) *Cardiovascular*

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrhythmia

7. Arterial Aneurysm

All persons authorized to carry firearms must meet a minimum standard of physical fitness. There are two categories for such person: Offensive Combative and Defensive Combative. Persons not authorized to carry firearms are exempt from these physical fitness standards.

(1) *Offensive Combative Standard* must be met by all security inspectors assigned to response force duties. The standard is a one (1) mile run with a maximum qualifying time of 8 minutes 30 seconds and a 40 yard prone-to-running dash with a maximum qualifying time of 8.0 seconds.

(2) *Defensive Combative Standard* must be met by all security inspectors authorized to carry firearms. The standard is a one-half (0.5) mile run with a maximum qualifying time of 4 minutes 40 seconds and a 40 yard prone-to-running dash with a maximum qualifying time of 8.5 seconds.

(3) *Qualification* in the appropriate combative standard must be accomplished once every twelve months and under the supervision of the protective force training officer or other individual designated by the responsible DOE field office.

(4) *Medical Certification.* (a) Each individual who participates in a physical fitness training program to prepare to meet the physical fitness standards set forth in this Appendix shall first be certified by a designated physician that he or she is medically fit to participate in the program. This certification shall be obtained not more than 30 days prior to each individual entering the physical fitness training program.

(b) Before any individual takes the physical fitness standards test he or she shall first be certified by a designated physician that he or she is medically fit to

take the physical fitness qualification test. This certification shall be obtained not more than 30 days before taking the physical fitness qualification test.

(c) Individuals who require less than 30 days training prior to actual testing to meet the physical fitness standards need only obtain a single medical certification.

(5) *Initial Qualification Time Limit.* Individuals authorized to carry firearms shall meet the applicable physical fitness standard by (insert date 12 months from date this rule is effective) and annually thereafter using the date of initial qualification as the anniversary date.

(6) *New Employees.* Individuals authorized to carry firearms who are employed after the effective date of this rule shall meet the applicable physical fitness standard prior to his or her initial assignment to duties which requires such individual to carry firearms.

(7) *Training Program.* Beginning January 23, 1985, incumbent security inspectors shall participate in a physical fitness training program.

(8) *Retesting.* During each testing period a security inspector shall be permitted a maximum of six (6) and a minimum of two (2) opportunities to qualify or requalify before such security inspector must enter a training program or is removed from a security inspector position.

G. *Waiver of Security Inspector Medical Standards and Time Extension to Meet Physical Fitness Standards.*

(1) Waivers of elements of the medical standards of this Appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:

I. *Guard Medical Disqualification Standards.*

(1) *Freedom from Incapacity.* The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

(2) *Conditions for Medical Disqualification.* The presence of any of the following conditions normally shall disqualify the examinee from employment as a guard:

(a) *Respiratory.* Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.

(b) *Cardiovascular.*

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrhythmia

7. Arterial Aneurysm

8. Significant Peripheral Vascular Insufficiency

(c) *Endocrine/Nutritional/Metabolic*

1. Diabetes Mellitus. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous two years.

2. Obesity. Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency job duties.

(d) *Hematopoietic Dysfunction.* Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.

(e) *Malignant Neoplasms.* Malignant neoplastic disease.

(f) *Neurological.*

1. History of epilepsy or other convulsive disorder.

2. History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.

(g) *Mental and Emotional.* An established history or clinical diagnosis of any of the following:

1. Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

2. Attempted suicide or an expressed threat of suicide.

3. A condition in which a person's intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.

4. A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

5. The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. For example, certain dosages or requirements for steroids, anticoagulants, antiarryhythmics, sedatives, tranquilizers, etc.

J. *Waiver of Guard Medical Standards.*

Waivers of elements of the medical standards of this Appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:

(1) The DOE field organization authority, in consultation with a designated physician, determines that a

certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards to assure that all guards are capable of safely and effectively performing all normal and emergency duties.

(2) The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physician, the ability to perform effectively and safely all routine and emergency duties.

(3) A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the satisfactory medical evaluation and/or of performance of the practical test required by a designated physician.

(4) Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed two (2) years.

(5) Individuals who have been adversely affected by application of these medical standards may appeal the denial of waiver to the cognizant DOE safeguard and security field office for review within 60 days after the adverse action. Further evidence may be offered relating solely to the medical or physical fitness of the individual involved. Such individual may select a representative of his or her own choice to assist and appear in the individual's behalf in any appeal. After findings and a determination have been made at the field office level, such individual has a right to petition the Director of Safeguards and Security, DOE Headquarters within 30 days of the field office's determination, for a final determination based upon his or her review of the record of the case.

[49 FR 46101, Nov. 23, 1984, as amended at 51 FR 7248, Mar. 3, 1986]